TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~743~~. 336

THE SHELBY RAILROAD COMPANY, APPELLANT,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND THE LOUISVILLE, CINCINNATI AND LEXINGTON RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED FEBRUARY 11, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1890.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, October 1st, 1888.

Present: Hon. Howell E. Jackson, United States circuit judge for the sixth circuit:

SHELBY RAILROAD COMPANY, Complainant,
v.
LOUISVILLE & NASHVILLE RAILROAD CO., LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Defendants.

Be it remembered that heretofore, to wit, on the 4th day of August, A. D. 1888, came the complainant, The Shelby Railroad Company, by counsel, and filed in the clerk's office of our said court its bill of complaint, which is as follows, to wit:

Circuit Court of the United States for the District of Kentucky.

To the judges of the circuit court of the United States for the district of Kentucky:

The Shelby Railroad Company, a corporation created by the laws of the State of Kentucky and a citizen of said State, brings
2 this its bill against the Louisville & Nashville Railroad Company and the Louisville, Cincinnati & Lexington Railway Company, corporations created under the laws of the State of Kentucky and citizens of the State of Kentucky; and thereupon your orator complains and says that it was created by an act of incorporation of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Shelby Railroad Company," which was approved March 15th, 1851, and that the defendant, The Louisville & Nashville Railroad Company, was created by an act of incorporation of the General Assembly of the Commonwealth of Kentucky entitled "An act to incorporate the Louisville & Nashville Railroad Company," which was approved March 4th, 1850, and that the defendant, The Louisville, Cincinnati & Lexington Railway Company, is a corporation organized under the general laws of the State of Kentucky authorizing the purchasers of railroad companies to incorporate themselves into a body politic and corporate.

Your orator further says that under and by virtue of the charter of the Shelby Railroad Company the county of Shelby was authorized and empowered to subscribe to the capital stock thereof, and by the terms of said original act power and authority was given to the county court of Shelby county to levy and collect by taxa-
3 tion upon the property of the persons residing in said county liable to the pay- of State revenue the amount of said subscription under the then existing laws.

It was also provided in said charter "that each and every person who pays any part of said tax shall be entitled to his *pro rata* share of said stock * * * and shall be entitled to demand and receive a certificate as soon as he shall have paid for a full, half, or quarter share or shall produce transfers from those who have paid portions so as to entitle him to a full, half, or quarter share."

That the said railroad company was duly organized under said charter of March 15th, 1851, and the amount which by the terms thereof was required to be subscribed before organization was duly subscribed in accordance with the provisions of said charter.

Your orator further says that the General Assembly of the Commonwealth of Kentucky have amended said original charter by an act entitled "An act for the benefit of the Shelby Railroad Company," which was approved February 15th, 1858, by the terms of which your orator was granted the further time of ten years to complete and finish its road; and your orator further charges that the said original charter was amended by an act of the General Assembly of the Commonwealth of Kentucky entitled "An act to amend the charter of the Shelbyville Railroad Co. and to authorize cer-
4 tain counties to take stock in the same," which was approved Feb. 3, 1869; which said amendment was duly accepted by your orator and the stockholders of said company.

By the terms of said amendment last named a portion of Shelby county therein specifically described was authorized to subscribe the sum of three hundred thousand ($300,000) dollars to the capital stock of your orator's company, and by proceedings had under and by virtue of said amendment and in accordance therewith said subscription was duly made, and the bonds authorized by said act were executed and delivered to your orator by the county judge and clerk of Shelby county.

Your orator further says that by the ninth section of said amendment of Feb. 3, 1869, it was provided that "the several counties and portions of counties shall not vote the stock for which certificates may be issued to the tax-payers, but the same shall be voted by the individual stockholders."

It further says that by the 7th section of said last-named amendment provision was made for the payment of said subscription by the levy and collection of taxes upon the property of persons residing within said described and designated portion of Shelby county, and said taxes were required to be levied for the payment of the interest on the bonds that were required to be executed on ac-
5 count of said subscription as well as for the payment of the principal thereof at maturity.

Said bonds were, by the terms of said act, payable in twenty years or, at the option of that district of said county, at any time after three years.

It was also provided in said 7th section "that the collecting officer shall execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when they amount to fifty dollars or more shall entitle the holder, upon presentation to the

proper officers of the company, to certificates of stock at the rate of one share of fifty dollars and every multiple of fifty."

Your orator further says that it was provided in the 12th section of said last-mentioned amendment that "no contract that the president or directors of said company may make with the Louisville, Cincinnati, & Lexington Railroad Company or any other railroad shall be valid until the same shall be ratified by the stockholders of this company."

Your orator further says that said original act of incorporation, the acts of Feb. 15, 1858, and Feb. 3, 1869, all of which were duly accepted by the said company and its stockholders, constituted a contract by and between said company and its stockholders, on the one part, and the State of Kentucky, on the other part, and that by the provisions of the Constitution of the United States the State of Kentucky is forbidden to make or pass any law impairing the obli-
gation of a contract.

6 Your orator further says that the General Assembly of the Commonwealth of Kentucky passed an act entitled "An act to amend an act entitled 'An act to amend the charter of the Shelbyville Railroad Company and to authorize certain counties to take stock in the same,'" which was approved by the Governor of said Commonwealth on March 11th, 1870, but which said amendment has never been adopted, ratified, or approved, or in anywise accepted by the stockholders of your orator's said company. By the terms of the third section of said last-named act it is provided:

§ 3. "That when any county or part of a county, city, town or precinct, shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the county judge and all the justices of the peace of the county; stock owned by part of a county or a precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and the several bodies may designate a suitable person or persons as their proxies to represent them in any meeting of the stockholders of said company. It shall be the duty of the county judge
7 to call together at the county-seat the justices entitled to vote, and to cause their action to be spread upon the records of the county court."

Your orator further says that the General Assembly of the Commonwealth of Kentucky passed another act entitled "An act entitled "An act to amend an act entitled 'An act to amend the charter of the Shelbyville Railroad Company and to authorize certain counties to take stock in the same,'" which was approved by the Governor of said Commonwealth on the 26th day of Feb., 1873, but which act your orator avers has never been accepted, ratified, or adopted in anywise by your orator's said company or the stockholders thereof. By the first section of said act it is provided:

§ 1. "Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the part of Shelby county embraced in

the boundary given in the said second section of an act entitled 'An act to amend the charter of the Shelbyville Railroad Company and to authorize certain counties to take stock in the same,' approved February 3, 1869, have the corporate name of 'The Shelby Railroad District of Shelby County,' and by that name may sue and be sued."

And your orator charges that said two last-named acts are and were from the beginning absolutely null and void, because they are in conflict with that clause of the Constitution of
8 the United States which forbids a State to pass any — impairing the obligation of a contract.

And your orator further says that under claim of authority under said two last-named acts the county judge and justices of said Shelby county have claimed and exercised, in violation of law, the right to vote at elections for directors and at the stockholders' meetings of your orator's said company, and your orator charges that said claim has been from the first, now is, and always has been unfounded and illegal.

Your orator further says that on the 16th day of July, 1879, the Louisville, Cincinnati & Lexington Railway Company and an illegally elected board of directors of your orator's company entered into a pretended contract by which your orator's said company pretended to lease unto the Louisville, Cincinnati & Lexington Railway Company its entire road from Anchorage, in Jefferson county, to Shelbyville, in Shelby county, which was the whole road owned and completed by your orator's said company, and that by the terms of said pretended lease it was agreed that your orator's said company let to the Louisville, Cincinnati & Lexington Railway Company its line of railroad for a term of thirty years from August 1st, 1879, all of which will more fully and at large appear by reference to a copy of said lease, which is herewith filed and made a part hereof, marked "A" for identity

9 Your orator says that the said board of directors which caused said lease to be executed was chosen and elected by reason of the casting of illegal votes in respect of nearly three hundred thousand (300,000) dollars of stock of the Shelby Railroad District of Shelby County under claim of authority so to do under and by virtue of the acts hereinbefore referred to of March 11th, 1870, and Feb. 26, 1873; and your orator says that said pretended lease was never ratified by the stockholders of your orator's company, but that the defendants are claiming that said lease was ratified at a meeting of said stockholders and by a vote of the majority in interest thereof, whereas in truth the fact is that at the pretended meeting of stockholders at which said lease is claimed to have been ratified the individual stockholders of your orator's company, including those who became so by the payment of taxes and the purchase and assignment of the tax receipts of other persons, — excluded from the right to vote, and that the county judge and justices of Shelby county or persons appoint- by them were allowed to vote two hundred and sixty-seven thousand seven hundred and seventy-five (267,775) dollars of stock in favor of the ratification of said lease.

And your orator says that said voting of said stock by the county judge and justices of Shelby county was wholly illegal, and that without said illegal vote thus cast as aforesaid said contract
10 was not ratified, and it has never been ratified by any vote of a majority of the stockholders in your orator's said company.

Your orator says that said pretended vote of $267,775.00 of stock in favor of the ratification of said contract was had and done in the name of the Shelby Railroad District of Shelby County and under the alleged authority of the said two last-named acts of the General Assembly and upon no other authority whatever, and that said acts were wholly ineffectual to give any authority to any person whatever to cast any vote in favor of the ratification of said lease or in respect thereto in the name and behalf of said Shelby Railroad District of Shelby County, and that without said illegal vote aforesaid the ratification of said lease was defeated.

And your orator further says that after the execution of the said pretended lease the Louisville & Nashville Railroad Company, without any authority of law therefor, purchased and acquired the entire stock of the Louisville, Cincinnati & Lexington Railway Company, and by virtue of said illegal purchase it took possession of the entire property, franchises, etc., of the said Louisville, Cincinnati & Lexington Railway Company, including the aforesaid road from Anchorage to Shelbyville belonging to your orator, and has the same now in its possession and is operating the same in violation of law and without any authority so to do.

11 Your orator further says that the said Louisville, Cincinnati & Lexington Railway Company has never been dissolved by law nor in anywise authorized to convey or transfer its rights, property, franchises or liabilities to the said Louisville & Nashville Railroad Co., and that its pretended ownership of your orator's said road under said lease is invalid and void.

Your orator says that the amount and value of the property in contest in this action, exclusive of interest and cost, is more than five hundred thousand (500,000) dollars.

Wherefore your orator prays that the aforesaid case may be declared and held by this honorable court to be null and void, and that the Louisville & Nashville Railroad Co. and the Louisville, Cincinnati & Lexington Railway Co. be compelled to deliver unto your orator the immediate possession and control of the said railroad, and that they be enjoined and restrained upon final hearing from ever disturbing your orator in the use, occupation, or possession thereof under any claim of right or authority so to do by reason of the execution of said pretended lease.

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, to be directed to the Louisville & Nashville Railroad Company and the Louisville, Cincinnati & Lexington Railway Company, thereby commanding them and each of them, at a certain date and under a certain pen
12 alty therein —, to be and appear before your honors in this honorable court, and then and there to answer all and singular

the premises and to stand to and perform and abide such order and decree therein as to your honors shall seem meet or shall seem agreeable to equity and good conscience; and your orator shall forever pray.

JNO. L. DODD,
B. F. BUCKNER,
Solicitors for Complainant.

UNITED STATES OF AMERICA, *State of Kentucky,* } *ss:*

At the city of Louisville and the county of Jefferson and the State of Kentucky, on this 4th day of August, one thousand eight hundred and eighty-eight, personally appeared before me, L. S. Kohnhorst, a notary public in and for said county and State, Jacob Krieger, Sr., who made oath before me that he was the president of the Shelby Railroad Company, and that the facts set forth in the foregoing bill, so far as they purport to be stated as of the knowledge of the Shelby Railroad Company, are true, and so far as they purport to be stated on information and belief he believes — to be true.

JACOB KRIEGER, SR.

13 [L. S.] Given under my hand and notarial seal this 4th day of August, 1888.

L. S. KOHNHORST,
N. P., J. Co., Ky.

The lease marked "A," referred to in bill, is as follows, to wit:

EXHIBIT "A."

(Copy.)

This indenture of a lease made and entered into by and between the Shelby Railroad Company, of the first part, and the Louisville, Cincinnati & Lexington Railway Company, of the second part, both being railway corporations incorporated under the laws of Kentucky, witnesseth:

First. The first party hereby leases to the second party for the term of thirty (30) years, to take effect as of the first day of August, 1879, its railroad extending from its terminus in Shelbyville, Kentucky, to the junction with the second party's line of railway, about one-half mile eastwardly of its depot, at Anchorage, its depots, turn-tables, water stations, rights of way, and all of its property, rights, and franchises, except and excluding from this lease its rolling stock, tools, and materials, cash, choses in action, and all other personal property nor used in operating its road.

Second. The second party will purchase the first party's rolling stock, tools, implements, and material in hand, and is to pay
14 therefor the fair and reasonable value thereof as may be agreed upon, and, failing to agree among themselves, such

value to be fixed by arbitrators, one to be chosen by each party from among experts in such matters, and, if the- fail to agree, they to select an umpire to decide between them.

The purchase price for said property is to be paid in two equal payments at three and six months from the said first day of August, 1879, conditioned upon the full consum-ation of this lease.

It is agreed that the second party shall perform the obligations of the first party as to all outstanding unexecuted contracts made by it for material and supplies, and it shall pay the sums agreed to be paid therefor by the first party and take and own said material and supplies.

Third. In consideration of the premises, as hereinbefore recited, the second party agrees and obligates itself to pay to the first party, its successors or assigns, and annual rental of fifteen thousand dollars ($15,000), to be paid in equal monthly installments, computing from the said first day of August, 1879, should this lease be fully executed: Provided, however, that when the second party shall have completed the Northern Division of the Cumberland & Ohio railroad from Eminence to Bloomfield, under any contract of lease for that purpose, and shall have begun to operate said road, then the annual rental to be paid by the second party shall be
15 only thirteen thousand ($13,000.00) dollars, to be paid in said monthly installments; and if said road shall be completed from Eminence to Bloomfield within three years from the full execution of this lease, then the first party shall refund two thousand ($2,000.00) dollars per year from the said date to the time of completion. The amount to be refunded may be retained out of the future installments of rent by said second party, but no interest shall be estimated on any sum that may be thus *be* refunded.

Fourth. To secure the installments of rent aforesaid, the first party shall have a lien upon the leased premises and upon the net earnings thereof; but in estimating said net earnings there shall not be charged as a part of the operating expenses any terminal expenses at the western terminus of the Shelby railroad, and not exceeding at the rate of twelve hundred ($1,200.00) dollars per year for general management of the leased premises—that is to say, not exceeding twelve hundred ($1,200.00) dollars per year of the expenses of the general management of all the second party's lines of railroad shall be charged to the leased premises in estimating said net earnings.

Should any installment of rent remain unpaid for sixty days after it becomes due, the president and directors of the first party
16 may, at their option, declare the lease forfeited, and may take immediate possession of all the property, rights, and franchises leased to the second party, and the second party agrees and obligates itself to surrender immediate and peaceable possession of the leased premises in the event the lease shall be declared forfeited as aforesaid, and thereafter the first and second parties will exchange business, including interchange of rolling stock, upon the terms common between them prior to the 17th day of February, 1879, viz., charges for freight and passengers going in the direction between Louisville and Shelbyville shall be divided upon the basis of sixty per cent.

thereof to the first party and forty per cent. thereof to the second party. All charges on freights and passengers to or from points on either road shall be divided in proportion to the distance carried by each company, such provisions, however, for exchange of business to continue only so long as said first party sends its business over the second party's line.

If after the completion of the railroad from Eminence to Shelbyville by said second party a forfeiture of this lease shall occur and difference should arise in fixing the rates and charges for freights or passengers between the parties hereto, such differences shall be fixed by arbitrators, arbitrators to be chosen one by each party from among railroad men, they to choose their umpire, if one be
17 needed; this stipulation, however, obligating only so long as said first party sends and receives its business over the second party's lines.

Fifth. The second party agrees and hereby obligates itself to keep the road-bed, depots, superstructure, and all the leased property in good repair.

Sixth. The second party shall not charge for freight or passengers to or from points on the Shelby railroad any higher rates than are charged for corresponding distances from Louisville on its own road, subject, however, to the right of the second party to alter its rates within the limits of its charter.

And it shall operate the Shelby railroad so as to afford not less facilities for the transportation of freight and passengers than are now given—that is, shall not run less than two daily trains (Sundays excepted) each way.

Seventh. The Shelby Railroad Company shall pay all taxes and assessments upon the leased premises, but shall not pay any expenses for repairs, improvements, or betterments (except such as may be agreed upon between the parties).

Eighth. The first party shall at once withdraw all opposition to the execution of any contract or lease between the second party and the Northern Division of the Cumberland & Ohio Railroad Company and contribute its influence toward the consummation of the same.

18 And it is agreed that no damages shall be claimed of the first party upon the dissolution of the injunction granted in the Shelby circuit court.

Ninth. Nothing contained in this contract shall be construed as an abandonment of the Shelby Railroad Company or as an estoppel against it as to any right asserted by it in the suit lately pending in the Louisville chancery court between the parties hereto, and from the judgment in which case an appeal has been prayed to the court of appeals by the party of the first part, except only during the continuance of this lease, unless the said first party shall fail to prosecute said appeal to the court of appeals in due time and to final judgment in said court.

In testimony of all which the said parties of the first and second parts, acting under the direction and approbation of their stockholders and presidents and boards of directors, have caused these

presents to be signed with the corporate name of each and the corporate seal of each hereto affixed, and countersigned by the secretaries of each of said parties this 16th day of July, 1879.

(Signed) SHELBY RAILROAD CO.,
By FIELDING NEEL, *Pres't.*

(Signed) GEORGE PETRY, *Sec'y.*

Attest: SHELBY VANMETTER, *N. P.*

19 July 28th, 1879.

[L. S.] LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY,
By J. B. WILDER, *President.*

Attest: S. S. EASTWOOD, *Sec't'y.*

STATE OF KENTUCKY, } *sct:*
County of Shelby, }

Be it remembered that on the 30th day of July, 1879, before me, John F. Davis, the county clerk of the county court of Shelby county, personally appeared F. Neel, the president of Shelby Railroad Company, and George Petry, the secretary of the same company, to me respectively personally known to be such, who, being by me severally and duly sworn, did depose and say that he, the said F. Neel, was the president and the said George Petry was the secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed to the foregoing by order of the board of directors of said company in obedience to the action of the stockholders of said company, and that the said F. Neel — George Petry signed their names thereto by the like order as president and secretary of the said company respectively, and the said F. Neel and George Petry, who produced to me the foregoing instrument from the said railroad company to the Louisville, Cincinnati & Lexington Railway Company, also acknowledged the
20 said instrument to be the act and deed of the said Shelby Railroad Company and their own act and deed.

Given under my hand this day and date first above written.

JOHN F. DAVIS,
Clerk Shelby County Court,
By THEOFT. STEELE, *D. C.*

STATE OF KENTUCKY, } *sct:*
County of Jefferson, }

Be it remembered that on this 2d day of August, 1879, before me, Wm. E. Leran, the clerk of the county court of Jefferson county, personally appeared J. B. Wilder, president of the Louisville, Cincinnati and Lexington Railway Company, and S. S. Eastwood, the secretary of the same company, to me respectively known to be such, who, being by me severally duly sworn, did depose and say that he,

the said J. B. Wilder, was the president, and he, the said S. S. Eastwood, was the secretary of said company; that they knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed to the foregoing by order of the board of directors of said company, and that they, the said J B. Wilder and S. S. Eastwood, signed their names thereto by the like order as president and secretary of said company respectively, and the said J. B. Wilder and S. S. East-
21 wood, who produced to me the foregoing instrument from the said railway company to the Shelby Railroad Company, also acknowledged the said instrument to be the act and deed of the said Louisville, Cincinnati and Lexington Railway Company and their own act and deed, and that I have recorded it and this and the foregoing certificate in my office.

Given under my hand this day and date first above written.

WM. E. LERAN,
Clerk Jeff. Co. C't, Ky.

STATE OF KENTUCKY, *Shelby County,* } *sct:*

I, Jno. F. Davis, clerk of the county court for the county aforesaid, do certify that the foregoing lease from the Shelby Railroad Company to the Louisville, Cincinnati and Lexington Railway Company was on the 12th day of August, 1879, produced to me in my office, with two certificates thereon endorsed, and the tax being paid on the 12th day of August, 1879, said lease and two certificates and the certificate are duly admitted to record in my office.

Given under my hand this 12th day of August, 1879.

JOHN DAVIS,
Cl'k Shelby County Court,
By THEOFT. STEELE, *D. C.*

A copy.
Attest:

A. J. STEPHENS,
Clerk Shelby County Court,
By J. M. LOGAN, *D. C.*

22 Upon which bill there was issued the following subpœna in chancery:

S'p'a in Ch'y.

The President of the United States of America to The Louisville & Nashville Railroad Company & The Louisville, Cincinnati. & Lexington Railway Co., Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in September next, to answer a bill in equity exhibited against you in our said court by the Shelby Railroad Co., which you shall in nowise omit under the penalty of the law.

Witness the Honorable Sam'l F. Miller, associate justice
[L. S.] of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Louisville, this 4th day of Aug., A. D. 1888, and in the 113 year of our Independence.

Attest: SAM'L B. CRAIL,
C. C. C., K. D.,
By HENRY F. CASSIN,
His Deputy.

MEMORANDUM.—The defendants are to enter their appear-
23 ance in the suit in the clerk's office on or before the 3rd day of September next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN,
His Deputy.

And upon which the marshal made the following return:

Marshal's Return.

Executed the within subpœna in chancery on the L. & N. R. R. Co. by delivering a true copy to M. H. Smith, vice-president of said company, he being the highest officer of said company found in this dist., this 6 day Aug., 1888; & on the L., C. & L. R'w'y Co. by delivering a true copy to M. H. Smith, president of said company, he being the highest officer of said company found in this district, this Aug. 6th, 1888.

A. J. GROSS,
U. S. Marshal,
By ED. RISLEY, *D. M.*

And afterwards, to wit, on the 1st day of October, 1888, came the defendants, by counsel, and filed in the clerk's office of our said court their demurrer to the bill of complaint, which is as follows:

Demurrer.

Circuit Court of the United States for the District of Kentucky.

THE SHELBY RAILROAD COMPANY, Complainant,
v.
THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY COMPANY and THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendants.

24 The defendants, The Louisville, Cincinnati & Lexington Railway Company and The Louisville & Nashville Railroad Company, come, by counsel, and demur to the bill of complaint herein and show for cause of demurrer—

1. The said bill shows a defect of parties defendant in this, that the "Shelby Railroad District of Shelby County" is not made a party thereto, and is a necessary and proper party thereto.

2. The said bill of complaint fails to state facts sufficient to show that the complainant is entitled to any of the relief sought therein, or any other.

3. Said bill of complaint contains a statement of facts which shows that complainant is not entitled to any of the relief sought, or any other.

4. Said bill of complaint states facts which show that complainant has, by laches and lapse of time, lost the power and right, if any it ever had, to complain of the making of the lease to the Louisville, Cincinnati & Lexington Railway Company, or the subletting to the Louisville & Nashville Railroad Company.

5. Said bill of complaint does not contain any statement of facts which shows complainant is entitled to any relief in equity whatever.

6. Said bill of complaint does not state facts sufficient to bring the matter attempted to be complained of within the jurisdiction of this court.

25 BARNETT, MILLER & BARNETT,
Counsel for Def'ts.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

M. H. Smith, being duly sworn, says he is vice-president of the defendant Louisville & Nashville Railroad Company, and the president is absent from this State, and he, said Smith, is president of the defendant Louisville, Cincinnati & Lexington Railway Company, and for said defendants he says the foregoing demurrers are not interposed for delay.

Given under my hand and seal as a notary public in
[SEAL.] and for said State and county this 1st day of October, 1888.

WM. MAGUIRE,
Notary Public, Jefferson Co., Ky.

I hereby certify that I am of counsel for defendants in the foregoing case, and that in my opinion the said demurrers are well founded in point of law.

A. BARNETT.

And — another day of said term of said court, to wit, on Wednesday, October 31st, 1888, came the parties, by their counsel.

The matters of law arising upon the demurrer of the de-
26 fendant as to the bill of complainant coming on to be heard, and the same having been argued by counsel in part, and there not being time to conclude same to-day, time is given until to-morrow.

Order Sust'g Demurrer.

And on another day of said term of said court, to wit, on Thursday, November 1st, 1888, came the parties, by their attorneys. The arguments of counsel upon the demurrer to the bill having been concluded, and the court being fully advised, it is ordered, adjudged, and decreed that the demurrer of the defendant to the bill of complaint be, and the same is hereby, sustained.

It is further decreed and ordered that the complainant do have until the December rules, 1888, to amend its bill herein.

And on another day of said term of said court, to wit, on the 3d day of December, 1888, came the complainant, by counsel, and filed in the clerk's office of our said court its amended bill, which is as follows, to wit:

Amended Bill.

Circuit Court of the United States for the District of Kentucky.

SHELBY RAILROAD COMPANY, Complainant,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Defendants.
} Amended Bill.

The complainant, by leave of court, amends its original bill herein and says that from and after March 11th, 1870, con-
27 tinuously until within three years last past the complainant's affairs and business have been dominated and controlled by boards of directors nominated and illegally elected from time to time by and in the interest of that portion of Shelby county now known as the Shelby Railroad District of Shelby County.

It says that the illegal votes cast by the said portion of Shelby county in the elections of directors and in the attempted ratification of the lease in controversy have, until the last three years, been large enough to overcome the votes of the individual stockholders.

It says that in consequence of the dominating and prevailing influence and control exercised as aforesaid the complainant has been prevented from questioning and contesting the validity of the lease in controversy and of the amendatory acts of 1870 and 1873, until about the time of the institution of this suit.

It says that the board of directors which caused the lease in controversy to be executed was composed of persons illegally elected by the vote of and in the interest of the said portion of Shelby county, and that at a meeting of the stockholders called by the said board for the purpose of ratifying the said lease the same was rejected by the individual and legal stockholders, but that by virtue of the illegal vote cast in favor of the said lease by the said portion of
28 Shelby county the same was reported as ratified.

It says that without the said illegal and dominating vote of that portion of Shelby county at the said meeting of stockholders called for the purpose of ratifying said lease the same was never ratified,

but rejected. It says that the said vote of that portion of Shelby county now called the Shelby Railroad District of Shelby County was cast under the alleged authority of the acts of the General Assembly of March 11th, 1870, and February 26th, 1873, and upon no other authority whatever, and that the said acts are and have been from the beginning illegal and no part of the complainant's charter.

Wherefore complainant prays as in and by its original bill it has already prayed, and for all proper and equitable relief.

B. F. BUCKNER,
DODD & GRUBBS,
Solicitors for Complainant.

Jacob Krieger, Sr., says he is president of the plaintiff corporation, and that the statements of the foregoing amended bill are true, as he believes.

JACOB KRIEGER, SR.

Subscribed and sworn to before me by Jacob Krieger, Sr., this first day of December, 1888.

JOHN L. DODD,
Notary Public, Jefferson County, Kentucky.

29 And on another day of said term of said court, to wit, on the 4th day of December, 1888, came the defendants, by counsel, and filed in the clerk's office of our said court its demurrer to complainant's bill as amended, which demurrer is as follows, to wit:

Demurrer to Amended Bill.

Circuit Court of the United States for the District of Kentucky.

SHELBY RAILROAD COMPANY, Complainant,
v.
LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY Co., Louisville & Nashville Railroad Company, Defendants. } Demurrer.

This day came defendants, by counsel, A. Barnett, and demurs to the complainant's bill as amended, and shows for cause of demurrer—

1. A defect of parties thereto in failing to make the "Shelby Railroad District of Shelby County" a party defendant to said bill, shown to be a corporation under the laws of Kentucky and within the jurisdiction of the court; and

2. Because said bill as amended does not state facts sufficient to show complainant is entitled to any relief in equity.

30 3. Because the bill as amended states facts which show that the plaintiff is not entitled to any relief in equity whatever; and

4. Said bill as amended does not exhibit a state of facts and par-

ties which confers any jurisdiction on this court to grant any relief whatever.

14 Fed. Rep., 498.

BARNETT, MILLER & BARNETT,
Solicitors for Defendants.

A. Barnett, solicitor for defendants, hereby certifies that, in his opinion, the foregoing demurrers are well founded in law.

A. BARNETT,
Solicitor for Def'ts.

S. S. Eastwood says, on oath, that he is secretary of the defendant The L., C. & L. R'y Co.; that the president, M. H. Smith, is now absent from this State; and affiant further says that the within demurrers are not interposed for delay.

S. S. EASTWOOD.

STATE OF KENTUCKY, *Jefferson County,* } *ss:*

Subscribed and sworn to by S. S. Eastwood before me this 4th day of December, 1888.

[SEAL.]

WM. MAGUIRE,
Notary Public, Jefferson County, Kentucky.

31 A. M. Quarrier says on oath that he is second vice-president of the defendant The Louisville & Nashville Railroad Company; that the president and vice-president are absent from this State; and affiant further says that the within demurrers are not interposed for delay.

A. M. QUARRIER.

STATE OF KENTUCKY, *Jefferson County,* } *ss:*

Sworn to and subscribed before me by A. M. Quarrier this 4th December, 1888.

[L. S.]

WM. MAGUIRE,
Notary Public, Jefferson County, Ky.

Order on Demurrer.

And on another day of said term of said court, to wit, on Monday, January 7th, 1889, this cause having been heard on the demurrer of the defendant to the bill of complaint as amended, it is adjudged that said demurrer be overruled so far as same is based on a supposed defect of parties, and is sustained because of a lack of equity in the said bill as amended.

And it is adjudged that the complainant's bill as amended be, and the same is hereby, dismissed, and that the defendants recover of the complainant its costs herein expended.

32 *Appeal Granted.*

It is on motion of the complainant ordered that an appeal be granted to the Supreme Court of the United States from the decree or order dismissing its said bill of complaint, and that it may execute an appeal bond in the sum of $250, with good surety bound therein.

And on another day of said term of said court, to wit, on Wednesday, January 23rd, 1889, came the complainant, by counsel, and tendered to the court its appeal bond herein, which is approved by the court.

The appeal bond above referred to is as follows, to wit:

Appeal Bond.

Circuit Court of the United States, District of Kentucky.

SHELBY RAILROAD CO.
v.
LOUISVILLE & NASHVILLE RAILROAD CO. *et al.*

Know all men by these presents that we, The Shelby Railroad Company, principal, and Jacob Krieger, Sr., surety, are held and firmly bound unto the Louisville & Nashville Railroad Company and the Louisville, Cincinnati & Lexington Railway Company — the sum of two hundred and fifty dollars, to be paid to the said Louisville & Nashville Railroad Company & the Louisville, Cincinnati &
33 Lexington railway & their assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 10th day of January, A. D. 1889.

Whereas the above-named Shelby Railroad Company hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Shelby Railroad Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SHELBY RAILROAD CO., [L. S.]
By JACOB KRIEGER, SR., *Pres't.* [L. S.]
JACOB KRIEGER, SR. [L. S.]

Sealed and delivered in presence of—
SAM'L B. CRAIL, *Clerk.*

Examined & approved Jan'y 23rd, 1889.
JNO. W. BARR, *Judge.*

34 DISTRICT OF KENTUCKY, *ss:*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing thirty-three pages contain a true and complete transcript of the record of the proceeding had in the case mentioned in the caption hereof.

Witness my hand and seal this 5th day of February, 1889.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

Endorsed on cover: Kentucky C. C. U. S. No. 743. The Shelby Railroad Company, appellant, *vs.* The Louisville & Nashville Railroad Company & The Louisville, Cincinnati and Lexington Railway Company. Filed February 11, 1889.

APR 13 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

THE SHELBY RAILROAD COMPANY, - - - Appellant,

VERSUS

LOUISVILLE & NASHVILLE R. R. CO., *et al.*, - Appellees.

HENRY H. HANCOCK, - - - - - - - - - Appellant,

VERSUS

LOUISVILLE & NASHVILLE R. R. CO., *et al.*, - Appellees.

B. F. BUCKNER,
For Appellant.

T. L. BURNETT,
JOHN L. DODD, } *Of Counsel.*

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

SUPREME COURT OF THE UNITED STATES.

THE SHELBY RAILROAD COMPANY, - - *Appellant,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, *et al.*, - - - - - *Appellees.*

HENRY H. HANCOCK, - - - - - *Appellant,*

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, *et al.*, - - - - - - *Appellees.*

These two appeals in the Circuit Court of the United States for the district of Kentucky are, by stipulation, to be heard together. They both present similar questions, although one of the appellants presents some questions not raised by the other. A brief statement of each case will suffice.

The Shelby Railroad Company, by its bill in equity, seeks to set aside a lease purporting to have been made in its name on the 16th of July, 1879, whereby the road-bed, stations, rights of way, turn-tables, etc., of the Shelby Railroad Company were leased to the Louisville, Cincinnati & Lexington Railroad Company for a period of thirty years, at a yearly rental of fifteen thousand ($15,000) dollars.

The ground alleged in the bill is that the lease was never approved by the stockholders, as provided in the 12th Section of the amended Charter of February 3, 1869, which requires the concurrence of a majority of the stockholders.

The Shelby Railroad Company was incorporated by an act of the General Assembly of the Commonwealth of Kentucky, approved March 15, 1851. It was amended by the act of March 10, 1854, February 15, 1858, and February 3, 1869. By the original charter and the amendments, which are set out in the Appendix, a part of Shelby County was authorized to subscribe three hundred thousand ($300,000) dollars to the stock of the Shelby Railroad Company, if a majority of the votes cast at an election provided for in the act should be in favor of such subscription. The result of the election was required by the act to be entered on the records of the County Court, and, if in favor of the subscription, the County Judge was required forthwith to cause the subscription to be made in the name of the said portion of Shelby County.

Under this provision of the charter an election was held, and a majority of the votes being in the affirmative, the subscription was made, and the eight per cent twenty-year bonds of that portion of the county designated in the act to the amount of three hundred thousand ($300,000) were executed and delivered to the Company on the 1st day of June, 1869.

The 26th Section of the original charter provided:

"That each any every person who pays any part of said tax shall be entitled to his *pro rata* share of said stock . . . and shall be entitled to demand and receive a certificate so soon as he shall have paid for a full half or quarter share, or shall produce transfers from those who have paid portions, so as to entitle him to a full half or quarter share."

The 9th Section of the act of February, 3, 1869, provided:

"The several counties and portions of counties shall not vote the stock for which certificates may be issued to the tax-payers, but the same shall be voted by the individual stockholders."

The bill alleges that the act of 1869 was accepted by the Company, but that certain other acts, which will be more specifically referred to hereafter, and which purport to be amendments to the charter of the Shelby Railroad Company, were not accepted

by the Company, and that they were in conflict with the rights conferred by the original charter and the amendment of 1869.

The act of March 11, 1870, expressly conferred upon any county or part of a county, which shall have delivered its bonds in payment for stock subscribed in the Company, the right to vote the stock so subscribed in any meeting of the stockholders of the Company in violation of those clauses of the original charter and the amendment of 1869, which conferred the right to vote in respect of such stock on the tax-payers and individual stockholders; and authorized the justices of the peace, residing in the part of the county so taxed, to appoint agents to cast said votes at the various stockholders meetings. The act of the 26th of February, 1873, conferred corporate powers upon that portion of Shelby County under the name of the Shelby Railroad District of Shelby County, and authorized it to sue and to be sued in such name.

These two last named acts are claimed to be unconstitutional and void, because they impair the obligation of the contract created by the act of 1869.

It is alleged that the lease in question was not ratified as required by law by the majority of the stockholders voting at the meeting in question, but that $267,775 of stock was voted at said meeting in favor of said lease by the agents of the Shelby Railroad District of Shelby County, under the alleged authority of the aforesaid acts of the General Assembly, approved respectively March 11, 1870, and February 26, 1872.

This general statement shows the scope and general purpose of the bill in equity filed by the Shelby Railroad Company against the Louisville & Nashville Railroad Company, and the Louisville, Cincinnati & Lexington Railroad, it being also alleged that the Louisville & Nashville Railroad Company, without any authority of law therefor, purchased and acquired the entire stock of the Louisville, Cincinnati & Lexington Railroad Company, and, that by virtue of such purchase, took possession of the entire property of the complainant and has been using and operating the same. without any right.

The case of Hancock v. the Louisville & Nashville Railroad Company *et al.* is a bill in equity by Hancock as a stockholder of the Shelby Railroad Company, seeking to set aside the above mentioned lease, alleging an attempt upon his part to procure the directors of the Shelby Railroad Company to bring an action to set aside said lease, and a refusal of the directors so to do, and praying to have the lease declared null and void, an account taken of the use of the property, and upon final hearing have a decree restoring possession of the road and requiring the defendants to pay such amount for the use and possession thereof as should be reasonable and proper.

It is further alleged by Hancock in his bill that the lease was illegal from the beginning, not only on the account of the failure of a majority of the lawful stockholders to ratify the same, but that the Shelby Railroad Company had no power to make, and the Louisville, Cincinnati & Lexington Railroad Company had no authority to accept a lease of said railroad, but that said lease between the two companies was *ultra vires* and void.

And, in the bill of the Shelby Railroad Company, it is also alleged that the lease was not approved by the majority of the stockholders of either of said contracting companies; that the meeting of stockholders, at which it was claimed that the contract was ratified, was not called by the president and directors of said companies as required by law; that no notice of the time and place thereof and the purposes of such meeting was advertised in any newspapers of general circulation in the county of Shelby as was required by law, and that for these reasons, as well as for the general lack of power on the part of the two companies, the lease was null and void from the beginning.

It is also alleged that the provisions of the act approved January 22, 1858, entitled an act to authorize railroad companies to make certain contracts with each other, does not authorize the lease in contest.

This general statement of the purport of the bills filed by the appellant severally will put the court in possession of the general outline and scope of the controversy. To these bills demurrers

were filed by the Louisville & Nashville Railroad Company, sustained by the lower court, the bills dismissed, and appeals prayed and granted to this court.

First Point.

The acts of 1851 and 1869 confer on the individual stockholders rights which are impaired by the acts of 1870 and 1873; that is, that the exclusive right to vote at stockholders meetings and the sole right to receive dividends given by the acts of 1851 and 1869, to the individual stockholders and those who should become so by the payment of taxes, is impaired by the acts of 1870 and 1873, which grant the right to the Shelby Railroad District of Shelby County to vote at stockholders meetings.

A due consideration of this proposition will be facilitated by a statement of the provisions of the original charter of 1851, and the amendment thereto of 1869. The Shelby Railroad Company was incorporated on March 15, 1851. The total capital stock was six hundred thousand dollars, with power after organization to increase it to a million if necessary. By Section 6 an organization was allowed as soon as fifteen hundred shares had been subscribed. One dollar per share, payable in money or negotiable notes, was required to be paid at time of subscription, and this provision was applicable to all subscriptions, individual and county alike.

The 22d section authorized the county court of Shelby county to subscribe, after an affirmative vote of the people, $300,000 toward the capital stock of the Company, which was by the 11th section, "payable at such times and upon such terms as may be agreed upon between these subscribers and the Commissioners or Directors taking the subscriptions; and the calls upon such stock may be at different times than those calls which may be made on other stockholders provided for in the 4th section of this act," and by the 23d section power was given to levy a yearly tax of not exceeding one half of one per cent *ad valorem*

upon the assessed property of the county to pay for their subscription. No provision whatever was made for the issual of bonds, but it is evident that the act contemplated the payment of the subscription in annual, or such other installments as might be agreed on, out of money directly raised by taxation for that purpose.

The 20th section provided that all payments on stock should bear interest until a dividend should be made, and power be given to issue stock certificates for such interest. And the Company was authorized "to take the obligations of these subscribers of stock in said Company for deficient installments and raise money by the discount of such notes; provided, "that the Company shall not issue certificates of stock until the same shall be paid for."

As to the stock which Shelby County was authorized to subscribe, the 24th section provided that the tax-payers might make direct payments to the Company of their respective assessments within three months after public notice that the tax had been levied, and was due and unpaid. Authority was given by the same section to enforce collection if not thus voluntarily paid.

The 26th section has already been quoted. It provides that each person paying taxes in discharge of any subscription shall be entitled to his *pro rata* of the stock subscribed, and shall be entitled to a certificate therefor upon the production of tax receipts to the Company. These provisions of the original charter clearly show that it was not contemplated that any one should be regarded as a stockholder in the Company except those who subscribed individually for the stock, or those who paid the tax levied by the counties for the payment of subscriptions made by their county courts. There was no provision for the issual of of any stock to a county. Indeed such a step would have been totally inconsistent with the two prominent ideas of the scheme, (1) that no stock certificate should be issued until the stock was paid for, and (2), that as such stock subscribed by the county courts of the counties was to be paid by a direct levy on the people to meet the installments as they fell due, the tax-payers alone were entitled to stock in respect to such subscriptions.

There was, therefore (and this idea is important,) no provision in the original charter authorizing the counties subscribing to vote at any shareholders meeting, nor authorizing them to receive dividends with respect to the stock subscribed; but, on the contrary, the clearly defined intention that the tax-payer should become a stockholder as he paid his taxes to the extent of "his *pro rata* share of such stock" subscribed by the county.

It was not contemplated in the scheme of the original charter that any bonds should be issued, but that a subscription should be made by the municipalities authorized to subscribe by contracts with the Company agreeing to pay the amount of the subscription in definite installments, the amount of which was authorized to be raised by taxation. The original charter made no provision for a mere fraction of a county subscribing for stock; but by the act of the 3d February, 1869, a designated boundary in Shelby County was authorized to subscribe a sum not exceedding three hundred thousand dollars. A vote was provided for under certain definite formalities, and by the 5th section of this act, if a majority of the votes cast were in favor of the subscription, the result was to be entered on the records of the County Court and the county judge was required "forthwith to cause the subscription to be made in the name of said portion of Shelby County."

The 6th section of the act of '69 also provided that, in the case of an affirmative vote of that portion of Shelby County designated in the act, "bonds shall be executed in the name and under the seal or scroll of that portion of Shelby County." The bonds were to bear interest at eight per cent per annum, payable semi-annually, had twenty years to run, with a proviso that they might be paid after three years, and were transferable by indorsement. They were to be signed by the county judge, countersigned by the clerk, and when thus executed were to be delivered to the Company "in payment of said subscription," with power in the directors to negotiate, hypothecate or sell them on such terms as they might deem expedient.

Provision was made in the 7th section for the levy by the

county judge and the justices of the peace of the precincts composing the taxed districts, and for the collection by the sheriff or such person as may be designated by those officers, of a tax not exceeding one per centum per annum, before the maturity of the bonds, to pay the interest and such portion of the principal as they may desire to pay. This collecting officer is required to "execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when the amount for fifty dollars or more, shall entitle the holder, upon presentation to the proper officers of the Company, two certificates of stock at the rate of one share for fifty dollars and every multiple of fifty."

The ninth section is in these words:

"The several counties and portions of counties shall not vote the stock for which certificates may be issued to the tax-payers, but the same shall be voted by the individual stockholders."

These are the provisions of the act of 1869 necessary to be referred to in respect of the questions involved in the case.

As already stated, under this amendment the portion of Shelby County designated therein voted in favor of the tax, and the county judge and county clerk issued eight-per-cent twenty-year bonds in the amount of $300,000, and delivered them to the company on the first day of June, 1869.

The court, I think, will have no difficulty in arriving at the conclusion that the general scheme of the act of 1851 was but slightly changed by the act of 1869. The deduction seems irresistible that under the act of 1851 the individual subscribers, and the tax-payers who paid assessments against them on account of the subscriptions in their behalf, were the only stockholders in the corporation. There is not only no provision made that the stock should be voted by the county authorities authorized to make subscription, but there is, on the contrary, the dual provision, (1) that no stock should be voted until paid for, and (2) that the stock subscribed for by the counties should be voted by the tax-payers when paid for by them. There is in this statute not only no pretense of giving any authority to the county offi-

cials to vote the stock, but the tax-payers are made stockholders and each one declared "entitled to his *pro rata* share of said stock" thus subscribed.

Let us see how far the act of 1869 changes the original charter, of which it purports to be an amendment. The principal change is that portions of certain counties are authorized to subscribe, whereas by the original act that right was limited to entire counties. There is no investiture of the tax-payers or officers of the portions of the county with any corporate existence, and no authority given any officers of the county to vote the stock subscribed in behalf of the tax district. The scheme, therefore, as it originally existed, and as modified by the amendment of 1869 was, that individuals, counties, cities, and a definite part of Shelby County might each subscribe to the stock of the Shelby Railroad Company; that the subscription of the individuals was payable in such installments as might be agreed upon, and that so far as concerned the portion which Shelby County was authorized to subscribe, it had authority to issue bonds subscribed by the county judge under the seal or scroll of that part of the county, and deliver such bonds in payment of its subscription. There is no grant to this part of Shelby County of any corporate existence. There is no power given it to vote stock or receive dividends, and the provisions of the original charter and of the amendment of 1869 leave the right of the individual stockholder and of the tax-payer who paid taxes levied in discharge of the subscription the exclusive privilege of voting the stock of the corporation and of receiving the dividends declared by it.

This important privilege, clearly conferred by the terms of the original charter and by the amendment of 1869, is completely set aside and annulled by the provisions of the acts of 1870 and 1873. Instead of the right of voting and receiving dividends being confined to the class of stockholders contemplated by those acts, a new corporation has been created and given the power to vote the stock subscribed and to appoint agents for that purpose, thus wresting the control of the corporation from the classes of subscribers contemplated by the original charter and by the

amendment of 1869, and placing it in the hands of a distinct corporation created and organized for that purpose.

Corporations are never created by an implication of law. There must be a distinct grant of corporate existence, a definition of the purposes for which the corporation is created and an enumeration of the powers which it may exercise. The authority given by the act of 1869 to a definite part of Shelby County to vote a subscription of stock to be paid for by taxes levied upon property holders in that locality gives to that portion of the county no distinct corporate existence whatever. Indeed counties in Kentucky have no corporate existence, and contracts made in behalf of counties are made by the justices of the County Court or by some other official of the county designated and specially authorized by law to make such contracts. The remedy for the enforcement of a contract thus made in behalf of a county is not by an action of debt against the county, but by mandamus against the taxing body of the county, requiring its members to levy a tax for the purpose of meeting the obligation in disputes. (See Justices of Clark County v. Paris, W. & Ky. R. T. Co. 11 B. M. 143; County Judge v. Shelby R. R., 5 Bush 325.)

In some of the Western States the counties have a distinct corporate existence not recognized by the legislative body of the State of Kentucky. The only ground upon which there is the slightest pretense for claiming that the act of 1869 created a corporation is that by the terms of the act the County Judge of Shelby County was directed to execute bonds "in the name of and under the seal or scroll" of that portion of Shelby County; but this is not sufficient; there must be in every case of the creation of a corporate body certain persons named as corporators, or a mode pointed out by which private persons may become members of the corporation. There must also be some purpose for which corporate existence is given and the duties and powers of the artificial body must be defined, and some indication given that the right of succession was granted to the corporators and their successors. In the case at bar there are no corporators named, no private individuals are invested with the rights of

succession, no powers, duties, or privileges are conferred on any named citizens. Indeed, there is not the slightest indication that any separate corporate existence or action was contemplated under the terms of the act of 1869. The acts to be done by the county judge were to be done by him as a public officer of the county and not as a member of any corporate body. Indeed, if it had been the intention of the legislature to create a corporation, it would have been provided that officers of that corporation and not of the county of Shelby should execute the bonds and perform the duties pointed out in the act. The creation of a corporation took place under the act of February, 1873, if indeed that act can be said to suffice for that purpose; for even that act, in which for the first time the idea of corporate existence occurs in any of the legislation, there are no corporators named, and a mere definite boundary of land is given a corporate name and authorized to sue and be sued by that name. I can not imagine how it is possible for a mere boundary of land, a specified portion of the territorial area of the county, to be manufactured into a corporation. There are no corporators named in the act. There are no officers named or given corporate function. In fact every element of corporate existence is wanting.

Even the act of the 11th of March, 1870, has no idea of the creation of a corporation in it. It merely authorizes the county judge and the justices residing in the district taxed to designate persons to act as their proxies to vote at a meeting of the stockholders of the company. These are not corporate functions. These officers are not the officers of the corporation, but the functions which they perform are the exercise of official duties incumbent upon them as county officers.

The idea of corporate existence, therefore, is not only an afterthought, but one which never occurred until the act of 1873 was presented to the legislature.

The act of 1870, while not creating a corporation, does attempt to confer rights in violation of the provisions of the act of 1869, for it gives representation and the right to vote at stockholders meetings to certain officers of the county, which, before the pas-

sage of that act could only have been exercised by individual stockholders and those who became so by virtue of the payment of taxes.

Unless the act of 1869 not only creates a corporation, but authorizes it to vote in the stockholders meetings with respect of the subscription of $300,000, it seems perfectly plain that the acts of 1870 and 1873 are clear and distinct impairments of the provisions of the original charter and the amendment of 1869. There must not only be the creation of a corporate body by the act of act of 1869, but that corporation must in addition have been authorized to vote the shares subscribed, receive the dividends, and exercise the other functions of a stockholder.

It seems too clear for argument that prior to the passage of the act of 1870 the provision of the charter which invested the individual stockholders and those who became so by virtue of the payment of taxes with the right to vote at stockholders meetings was exclusive. There was not only a failure to invest the municipalities with the right to vote stock subscribed by them, but the ninth section of the act of 1869 expressly forbids the municipalities to vote such stock, and invest that right in the tax-payer. The intent of the ninth section is clear and unmistakable. It was inserted to negative expressly the implication that the officers controlling the municipal bodies might vote the stock thus subscribed by them, and to place that right clearly and unmistakably in the hands of the tax-payer. And this purpose is more clear and more apparent, if possible, when we remember that the provisions of the original charter, unaltered by any thing in the amendment of 1869, forbade the company to issue any certificates of stock until the same was paid for. (See Sec. 20, original Charter.) Besides that, the 26th section of the original act, which remained unaltered by any thing in the act of 1869, conferred upon each tax-payer the right to his *pro rata* of the stock subscribed, and provided that he and not the municipality should receive the certificates of stock in respect of such subscription and payment. It is impossible, and all the ingenuity of counsel will fail to harmonize these provisions with the

assumption that the act of 1869 contemplated control and management of the stock by the officers of the municipality subscribing therefor.

I submit, therefore, that prior to the passage of the act of 1870 the right of the individual stockholder, and the stockholder who became so by reason of the payment of taxes, to vote in the stockholders meetings and to receive dividends in respect of the municipal subscription, was not only indisputable but exclusive. To these two classes alone was the control of the corporation granted by the legislature in the original charter and the act of 1869. Since the Dartmouth College case down to the present time it has been unlawful by subsequent legislation to wrest the control of a corporation from the body of corporators originally chosen and invested with that power, and place the same in the hands of a new or additional body. In no State has this principle been more clearly recognized than in Kentucky, and notwithstanding by a general act of the legislature all charters are subject to amendment, unless the contrary be expressed, it is well settled by a long line of cases in this State that vested rights of property can not be disturbed by subsequent legislation. Beginning with Sage v. Dillard, 15 B. M. 355, and coming down to Orr, &c., v. Bracken County, 81 Ky. 593, including the cases, Louisville v. University, 14 B. M. 699; L. C. & L. R. R. Co. v. The Commonwealth, 10 Bush, 47; Commissioners, &c., v. Green and Barren River, 79 Ky. 82; Covington v. Bridge Campany, 10 Bush, 74, there has been an unbroken line of decisions adverse to the power of the legislature to interfere in the affairs of a corporation by depriving the original corporators of control, even in those cases in which the charters contained an express reservation of the power to alter and amend at will.

But to return a moment to the question of the effect of the act of 1869. Nothing is better settled than that a corporation can not be created without express grant. It is text book law that "the intention of the legislature to confer corporate powers is essential to an act of incorporation, and no presumption is to be allowed in favor of the grant." (Morawetz Sec. 10.) If the doc-

trines of this court declared in Fertilizing Company v. Hyde Park, 97 U. S. 659, apply to the question of the existence of a corporation, as well as to the extent of its power and authority if clearly created and undoubtedly in existence, there should be no doubt, it seems to me, that there was never any intention manifested by the legislature to create a corporate body until the passage of the act of 1870.

The contention, that by the act of 1869 the $300,000 subscribed could be voted by some unnamed and only to be guessed at representative of that portion of Shelby County authorized to subscribe, is best answered by the fact that the passage of the act of 1870 demonstrated its absolute necessity, for if the power to vote the stock had previously existed, if there had been a corporate body previously created with executive officers authorized to act for it, there would have been no necessity for the passage of that act. Therefore, the fact that the legislature in 1870 declared the right of this subdivision of the county to vote the stock subscribed, and designated the persons who should have the right to cast the vote, seems conclusive that until the passage of that act there was no such power, no officer having such authority and no means by which there could be any thing like corporate action upon the part of the tax-payers of that subdivision of the county. In fact their action with reference to the affairs of the Shelby Railroad Company had been *individualized* by the previous legislation, and a radical change was necessary to enable concerted, much less corporate action by them.

The assumption that the right to vote at stockholders meetings belonged to the corporation with respect of the original amount subscribed, and to the stockholders with respect to the amounts severally paid by them, involves the principle that the stock of individual subscribers and of the early tax-payers could be rendered utterly and entirely worthless by the continuation of the debt created by the issual of the bonds in June, 1869, throughout an indefinite period of time. Indeed, this has been the very scheme attempted, and acts of the legislature, which had never been accepted by the Shelby Railroad Company, have

authorized the renewal of the bonds originally issued from time to time, so that there is now by the act of the 29th of February, 1884, authority in the Shelby Railroad District of Shelby County to issue bonds to the amount of $220,000 in respect of this subscription made in 1869, bearing interest payable semi-annually, with twenty years to run from date of issue. The contention on the other side is, that as long as taxes are levied with respect to this subscription the tax-payers, whether they are such with respect to interest or principal, are entitled to stock in the Company, and in respect of this stock the Shelby Railroad District of Shelby County can vote the unpaid amount of the principal of the the debt. The result of this action by the Shelby Railroad District of Shelby County is that that county still owes, or did in 1884, $220,000 of the debt created in June, 1869, by this subscription to the stock of the Shelby Railroad Company; and that interest on that sum up the year A. D. 2004 constitutes valid stock in the Shelby Railroad Company, and that during that period this unique corporation will continue to vote the stock represented by the unpaid principal of the debt. A more ridiculous and seemingly absurd contention could scarcely be made. This subdivision of Shelby County subscribed $300,000 to the stock of the railroad company in 1869; it borrowed the money on its bonds, for such was substantially the effect of the delivery of the bonds to the railroad company, and that debt it has renewed from time to time, and if the future may be judged by the past, it will continue to renew from time to time until the stock of the railroad company has, by this process, been so thoroughly drenched as to possess no value whatever. That stock amounting to a million of dollars may be obtained in the corporation upon a subscription of $300,000, which was paid to the corporation by the delivery of bonds to that amount, is a proposition so unjust, so monstrous that nothing short of an express declaration of the legislative intent that such result was to be accomplished could justify the judiciary in so declaring. The injustice of this construction is perfectly manifest when we consider that the tax-payers of the district are a constantly changing body of

men, and it is unjust in the highest degree to use the earnings of this Company to lighten the burdens of debtor, the Shelby Railroad District of Shelby County. This district owes somebody the unpaid balance of the subscription of $300,000. That it should have the right to call upon the Shelby Railroad Company for its dividends to aid in lightening its own burdens assumed by the creation of the debt when it issued its bonds in 1869, seems in the highest degree unjust. The tax-payers are entitled to stock to the extent of $300,000, they and their assignees are entitled to participate in the dividends, if any, which may be declared by the Shelby Railroad Company. To give this right to the Shelby Railroad District of Shelby County, or by judicial construction to authorize it to share the right with the tax-payers, or to authorize the increase to an indefinite amount of the stock issuable with respect to this subscription of $300,000, seems to be in the highest degree unjust and inequitable.

POINT SECOND.

Neither the Shelby Railroad Company nor the Louisville, Cincinnati and Lexington Railway Company had any authority to execute the lease in contest. To legalize the lease each railroad company thus contracting should have the corporate capacity to enter into the contract.

The allegations in the bill of the case of Hancock against the Louisville and Nashville Railroad Company put in issue the capacity of the two contracting railroad companies to enter into the lease in contest. Since the decision of Thomas v. Railroad Company, 101 U. S. 81, there seems to be no question but that there must be a concurrence of power to contract in both companies, or otherwise the contract in question is *ultra vires* and void. The bill alleges a lack of capacity to enter into such contract on the part of both contracting parties, which is admitted by the demurrer. It is also alleged that the defendants claim that the lease is valid under the authority conferred by an act en-

titled "An act to authorize railroad companies to make certain contracts with each other," approved January 22, 1858, but that the said railroads are not so connected as to form a continuous line, and therefore not within the purview of the provisions of the act, and that the provisions thereof with reference to the ratification of any contract between the two companies by the stockholders were not complied with.

By the act of 1858 (see Appendix) the legislature authorized railroad companies to consolidate with each other and to lease each other's line, and the provision is that they may so lease when they are "so connected as to form a continuous road."

The argument on the other side is that the words in question were intended to grant the power to lease in all cases of railroads so located with reference to each other as that a physical connection of the tracks of the two roads is possible. This, it seems to me, is clearly erroneous.

The public policy prohibits the consolidation of competing lines of railway or other companies engaged in the carriage of goods and freight, and the language used implies something more than that the right to lease is dependent merely upon the possibility of physical connection. It implies the possibility by the leasing of a contiguous line, of the extension (not necessarily in a straight line) of the existing line to another and more distant terminus. This is clearly implied by the use of the word "*continuous*." The roads shall not only be connected by physical contingency and touch, but they shall be so connected, in the words of the act, "as to form a continuous road," and the idea of extension or further continuity of a general route is clearly implied by the language used in the act. Should there be any doubt as to the true construction of the words of this statute, public policy requires that they should be limited to such lines as do not and can not compete with each other. The line from Shelbyville to Louisville, if fully completed, would be an almost parallel line. Shelbyville is distant about eight miles from the Louisville, Cincinnati and Lexington Railway, and its line runs in a general course parallel to that of the Louisville, Cincinnati and Lexington

Railway until they touch at Anchorage, twelve miles from Louisville. It is contended, therefore, that these two lines are *not* "so connected as to form a continuous road" within the meaning of the act. The court is referred upon this subject to the very able opinion of Okey, C. J., in State v. Vanderbilt, 37 Ohio State, 642, *et seq.* I assume, therefore, on the authority of that case, as well as upon the clear intent of the act as expressed therein, that where two roads are in such connection or juxtaposition with each other as that the leasing of one by the other will *extend* or *lengthen* the line and create a *new terminus*, that the act applies, and that it applies only in such a case.

It also clearly appears from the bill that the formalities required by the act of 1858 were not complied with in the ratification of the lease by the stockholders of the two companies, and in that it is there invalid.

B. F. BUCKNER,
For Appellant.

JOHN L. DODD,
T. L. BURNETT,
Of Counsel.

APPENDIX.

Charter of the Shelby Railroad Company.

Chapter 431. *An act to incorporate the Shelby Railroad Company.*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That James M. Bullock, Wm. Standeford, Josephus H. Wilson, John Carver, Wm. Jarvis, Robert B. Winlock, S. C. Boney, Shannon Reid, Edward C. Payne, Bartlett M. Hall, Isaac F. Collier, Andrew S. White, Tandy M. Allen, Robert S. Sanders, George Smith, William Threlkeld, Preston Owen, Henry C. Offutt, Joseph H. Stout, H. A. Bailey, Thomas Smith, jr., John M. Dowell, William H. Crapster, Archibald R. Scott, James V. ——— ——, B. S. Shelburne, John Huffman, William Hanna, James Wight, James Wilson, Silas Yeager, John Williamson, J. Bushrod Obannon, Samuel Crum, and Dr. Freeman, be and they are hereby appointed commissioners, under the direction of any five or more of whom subscriptions may be received to the capital stock of the Shelby Railroad Company hereby incorporated: and they may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions in the capital stock of said company, after having given such notice of the times and places of opening the same as they may deem proper; and after the first opening of said books they shall be kept open for at least five successive days; and if at the expiration of that period such a subscription to the capital stock of said company as is necessary to its incorporation shall not have been obtained, the said commissioners, or any five of them, may cause the said books to be opened from time to time, after the expiration of said five days, for the space of two years thereafter, or until the sum necessary to the incorporation of said company shall be subscribed, if not sooner subscribed; *provided*, that any subscription or subscriptions tendered at any time or place other than that advertised by said commissioners, if accepted by them, shall be as valid against the party subscribing as if received at the times or places advertised; and if any of said commissioners shall die, resign, or refuse to act during the continuance of the duties devolved upon them by this act, others

may be appointed in his or their stead by the remaining commissioners, or a majority of them.

§ 2. That the capital stock of the Shelby Railroad Company shall be six hundred thousand dollars, in shares of fifty dollars each, which may be subscribed for by any individual or corporation; and as soon as fifteen hundred shares of said capital stock shall be subscribed, the subscribers of said stock, their successors and assigns, shall be and they are hereby declared to be incorporated into a company by the name of the Shelby Railroad Company; and by that name shall be capable in law of purchasing, holding, selling, leasing, and conveying real estate not exceeding five thousand acres, and personal and mixed estate, so far as the same may be necessary for the purposes hereinafter mentioned, and shall have perpetual succession; and by said corporate name may sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at their pleasure; and shall have, enjoy, and may exercise all the powers, rights, and privileges which other corporate bodies may lawfully do for the purposes mentioned in this act.

§ 3. That if more than twelve thousand shares shall be subscribed to the capital stock of said company the said commissioners, or a quorum thereof, which shall consist of not less than five, shall reduce by striking off in succession from the largest number of shares subscribed for by single individuals or corporations until the subscriptions shall be reduced to twelve thousand shares, so as to equalize the stockholders, as far as may be; *provided*, that the number of shares subscribed on behalf of Shelby County, according to the provisions of subsequent sections of this act, shall in no event be reduced except by the express consent of the president and directors of said Shelby Railroad Company; *and, provided further*, that the number of shares subscribed on behalf of the town of Shelbyville shall in no event be reduced except by consent of the president and directors of said company.

§ 4. That at every such subscription there shall be paid, at the time of subscribing, to the said commissioners, or their agents appointed to receive such subscriptions, either in money or a note negotiable and payable at some bank, at sixty days' date, or longer, at the option of said commissioners or their agents, the sum of one dollar on every share subscribed; and the residue thereof shall be paid in such installments and at such times as may be required by the president and directors of said company; *provided*, that no payment shall be demanded until at least thirty days' notice of such demand shall have been given by the president and directors in some newspaper published in the town of Shelbyville; nor shall more than fifty per cent of each share of stock be called for in any one year; but if the exigencies of the

company should require the payments on the stock to be made more rapidly than is provided for herein, or should the president and directors, or a majority of the whole board of directors, or a majority of the whole number elected, consider it expedient for the purposes of aiding the stockholders, or hasten the completion of the contemplated road, it shall be lawful for them to borrow money on the credit of said company, in amount not exceeding three hundred thousand dollars; and it shall also be lawful for the president and directors of the said Shelby Railroad Company, and they are hereby vested with full power and authority to issue and sell the bonds of said company, in such form, and in such amounts, and payable at such time and places, with interest half yearly, as they shall find convenient and proper, to an amount not exceeding three hundred thousand dollars, and upon such terms of discount as they may deem to be to the interest of the company, to expedite the speedy completion of the road, and secure the same by a deed of trust, or mortgage on said road and all its property and effects, conditioned for the prompt and punctual payment of the interest on said bonds, as it shall fall due, and the principal when it shall become due, and with authority for the trustee or mortgagee to sell said road and all its property to raise said interest and principal if not punctually paid, on such notice as is declared in the deed of trust or mortgage, without suit and decree of foreclosure; and to enable the company to sell said bonds it shall be lawful to contract with any person or persons, company or corporation, to guarantee the punctual payment of the interest and principal of said bonds; and if so guaranteed, the guarantors shall be entitled to all the rights and privileges of the charter, and be subject to all the obligations, limitations, and restrictions of the same; and if any subscriber shall fail or neglect to pay any installment or part of said subscription demanded according to the provisions of this section, the same may be recovered by action of debt, in the name of said corporation, against such defaulting subscriber, in any tribunal having jurisdiction of like cases; and in all such actions publication as directed in this section shall be the only demand necessary to be proven; or in case such failure or neglect to pay any installment, or part of said subscription, demanded according to the provisions of this section, shall continue for the space of sixty days next after the time the same shall be due and payable, the board of directors may in their discretion order that the same shall be forfeited to the company; and they may also sell it for the benefit of the company if they think proper so to do; but the said board of directors, by a majority of the whole board, may remit any forfeiture on such terms as they may think proper.

§ 5. That if the subscription herein made necessary to the incorporation of said company shall not be obtained within two years after the first opening of the subscription books by the said commissioners, this act, and all the subscriptions under it, shall be null and void; and the said commissioners, after discharging the expenses of opening the books, preliminary surveys, and other liabilities incurred in endeavoring to obtain subscriptions of stock, shall return the residue of the money paid in upon such subscriptions to the several subscribers in proportion to the respectively paid in by them.

§ 6. That as soon as practicable, after fifteen hundred shares of stock shall have been subscribed, the said commissioners, or a majority of those acting, shall call a general meeting of the subscribers at such time and place as they may appoint, and shall give at least twenty days' public notice thereof; and at such meeting the commissioners shall lay the subscription books before the subscribers then and there present, and thereupon the said subscribers, or a majority of them then present, shall from among the stockholders elect six directors, by ballot, to manage the affairs of the company; and these six directors, or a majority of them, shall have the power of electing a president of said company, either from among the directors, or any other stockholder, and of allowing him such compensation for his services as they may deem proper; and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by him, her, or it; and every stockholder may, in writing, depute any other person to vote for him, her, or it, as his, her, or its proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors.

§ 7. That to continue the succession of the president and directors of said company, six directors shall be chosen annually, on the first Tuesday in May every year, at Shelbyville, by the stockholders of said company; and that the directors of said company, or a majority of them, shall have power to appoint judges of all elections, and to elect a president of said company, either from among the directors, or any other stockholder, and to allow him such compensation for such services as they may deem proper; and if any vacancy shall occur, by death, resignation, or refusal to act, of any president or director, before the year for which he was elected has transpired, a person to fill such vacant place for the residue of the year may be appointed by the president and directors of said company, or a majority of them; and that the president and directors of the company shall hold and exercise their offices until a new election of president and

directors; and that all elections which are, by this act or the by-laws of said company, to be made on a particular day, or at a particular time, if not made on such day or such time, may be made at any time within thirty days thereafter.

§ 8. That a general meeting of the stockholders may be called at any time during the interval between the annual meetings by the president and directors, or a majority of them, or by the stockholders owning at least one fourth of the whole stock subscribed, upon giving thirty days' public notice of the time of holding the same, which shall be at some place in Shelbyville named in the advertisement; and when any such meetings are called by the stockholders, such notice shall specify the particular object of the call; and if at any such called meetings a majority (in value) of the stockholders of said company are not present in person or be proxy, such meeting shall be adjourned from day to day, without transacting any business, for any time not exceeding three days; and if within said three days stockholders having a majority (in value) of the stock subscribed do not attend, such meeting shall be dissolved.

§ 9. That at all the regular meetings of the stockholders of the said company it shall be the duty of the president and directors in office for the preceding year to exhibit a clear and distinct statement of the affairs of the company. That at any called meeting of the stockholders a majority (in value) of the whole stock subscribed being present, or a majority (in value) of the attending stockholders, may require similar statements from the president and directors, whose duty it shall be to furnish them when thus required; and that at all general meetings of the stockholders a majority (in value) of all the stockholders in said company may remove from office the president or any of the directors of said company, and fill up vacancies thus created in the same way and to the same extent that they could do at their stated meetings.

§ 10. That every president and director of said company before he acts as such shall swear or affirm (as the case may be) that he will well and truly discharge the duties of said office to the best of his skill and judgment.

§ 11. That if the county court of Shelby, or the trustees of Shelbyville, shall subscribe for stock in said road, either under and by virtue of such laws as are now in force, or upon the passage of laws by the General Assembly authorizing them to subscribe stock in said road, the subscriptions so made shall be made payable at such times and upon such terms as may be agreed upon between the subscribers and the commissioners or directors taking the subscriptions; and the calls upon such stock may be at different times than those calls which may be made upon other stockholders, as provided for in the fourth section of this act.

§ 12. That if any of the stock created by virtue of this act shall remain unsubscribed until after the election of the president and directors, as provided for in the second section of this act, the said president and directors, or a majority of them, shall have power to open books and receive subscriptions to any of the capital stock of said company which may remain unsubscribed for, or to sell or dispose of such unsubscribed stock for the benefit of the company for any sum not under its par value; and the purchasers or subscribers of such stock shall have all the rights, powers, and privileges of original subscribers, and shall be subject to the same regulations.

§ 13. That the said president and directors, or a majority of them, may appoint all such officers, agents, engineers, or servants whatsoever, as they may deem necessary for the transaction of the business of the company, and may remove any of them at their pleasure. That they, or a majority of them, may have power to determine by contract the compensation of all the officers, engineers, agents, servants, or others in the employ of the said company, and to regulate by their by-laws the manner of adjusting and settling all the accounts against said company. That they, or a majority of them, shall have power to erect buildings for the safe-keeping of all articles intrusted to them for transportation, and work-shops necessary for the business of the company. That they, or a majority of them, shall have power to direct the manner, and by what evidence stock in said company may be transferred; and to pass all by-laws which they may deem necessary or proper for exercising all the powers vested in the company hereby incorporated, and for carrying the object of this act into effect; *provided only* that such by-laws shall not be contrary to the laws of the United States or the laws of this State. The president and three directors, or any four directors without the president, shall constitute a quorum of the board of directors for the transaction of all business, and the execution of all powers confided in said board by this act or the by-laws of said company.

§ 14. That if the capital stock of said company shall be deemed insufficient for the purposes of said act, it shall and may be lawful for the president and directors of said company, or a majority of them, from time to time, to increase the said capital stock by the addition of as many shares as they may deem necessary, not exceeding in amount the further sum of four hundred thousand dollars; for which they may at their option cause subscriptions to be received, giving notice in the manner hereinbefore prescribed; or may sell the same for the benefit of said company, and upon such terms of discount as they may deem to be the interest of the company; or may, upon the request of the stock-

holders representing in interest two thirds of the stock, mortgage the road for any sum necessary for its completion.

§ 15. That the president and directors of said company shall be and they are hereby invested with all the rights and powers necessary for the construction and repair of a railway, with such appendages as may be deemed necessary for the convenient use of the same, commencing at some eligible point in the town of Shelbyville; thence by such route as they may select to intersect with the Louisville and Frankfort Railroad, and at such point therein, diverging therefrom at an angle of twenty degrees or more, as may be agreed on by the president and directors of the Shelby road, or a majority of them, not to exceed sixty-six feet wide, with as many sets of tracks as the said president and directors, or a majority of them, may deem necessary; and that they may cause to be made a contract with others for making said railroad, or any part of it; and they, their agents, or those with whom they may contract for making any part of the same, or their agents, may enter upon, and use, and excavate any land which may be wanted for the site of said road, or the location of warehouses, or other works necessary to said road, or for any other purposes necessary or useful in the construction or repair of said road or its works, or the use thereof after its completion; and that they may build bridges, provided the same do not obstruct the navigation on navigable streams; may construct said railroad across or along turnpike or other public roads or streets; may fix scales and weights; may lay rails; may take and use any earth, timber, gravel, stone, or other materials which may be wanted for the construction or repair of said road, or any part of its works; and may make and construct all works whatsoever which may be necessary and expedient in order to the proper completion or improvement of said road.

§ 16. That the fortieth, forty-first, forty-second, forty-third, forty-fourth, forty-fifth, forty-sixth, and forty-seventh sections of an act of the General Assembly of the Commonwealth of Kentucky, entitled "An act to incorporate the Licking and Lexington Railroad Company, and Louisville and Frankfort Railroad Company," approved March 1, 1847, be and the same are hereby re-enacted and incorporated into this act, and as part of the same, only substituting, when it is proper, the style of this company in lieu of the style of the Louisville and Frankfort Railroad Company, and striking out the words "between Frankfort and the river," as they occur in said forty-fourth section; and the provisions of said sections of said act shall be applicable to this company as though they were copied into this act as a part thereof.

§ 17. That if said company shall not commence the said

road leading from Shelbyville to some point of junction with the Louisville and Frankfort Railroad within three years from the first day of May next ensuing the passage of this act, and shall not cause the same to be finished within ten years from the time of the commencement thereof, then this act shall be null and void.

§ 18. That full right and privilege is hereby reserved to the citizens of this State, or any company incorporated or hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for any other railroad leading from the main route, and diverging therefrom at an angle of twenty degrees or more, to any part or parts of the State; *provided*, that in forming such connection no injury be done to the works of the company hereby incorporated; *and provided also*, that no railroad company now incorporated, or that may hereafter be incorporated, shall make a parallel road approximating within the distance of eight miles at any one point on either side of said Shelbyville Railroad.

§ 19. That so soon as said company shall have completed five miles of their route they may commence and prosecute their business upon the terms and upon the stipulations herein provided for as though the whole work was completted.

§ 20. That all payments made on the stock of said company shall bear interest at the rate of six per cent per annum until a dividend shall be made; and the president and directors are authorized and required to issue to the persons entitled certificates of stock for all such interest, in addition to the shares subscribed or held by them. And the president and directors of said company shall have the right to take the obligations of the subscribers of stock in said company for deficient installments, and raise money by discount of such notes; *provided*, that said company shall not issue certificates of stock until the same shall be paid for. And it shall be lawful for said president and directors to contract for the whole or any part of the work and materials toward and for the construction of said road, on time, and to borrow money, on time, to pay for work and materials for said road, and to secure any and all such debts by the bond and obligations of said company, and to execute a mortage or mortgages upon said road, or any or all the property of the same. And it shall be lawful for the president and directors to commence the construction of said railroad at Shelbyville, or at the other extremity of said road, or at any intervening point, and to progress with the same concurrently or at different times.

§ 21. That it shall be lawful for said railroad company to branch the said road, and to run lines to any point or points in the counties of Shelby, Spencer, Anderson, Franklin, Henry,

Oldham, or Jefferson, on the terms mentioned in this act, and especially in the direction of the town of Danville, in Boyle County, *provided* the same diverges twenty degrees or more in the junctions thereof with the Louisville and Frankfort Rialroad. It shall be lawful for the company to unite this road with any other railroad in any of said counties, which now is or may hereafter be constructed, with the consent of the directors of said other railroad company. It shall be lawful for other railroad companies now or hereafter to be incorporated to unite with this road, with the consent of the president and directors of this road; and it shall be lawful for the Shelbyville Railroad Company to contract with any other railroad company, which now is or may hereafter be incorporated in this State, for the use of the locomotives, cars, engines, vehicles, carriges, or machines of any description whatever, belonging to each respective railroad company, and to be used upon the tracks of each respective railroad company, upon such terms and under such stipulations and conditions as may be agreed upon by the said companies contracting.

§ 22. Whereas, the county court of Shelby have requested the passage of a law authorizing and empowering said county court to subscribe not exceeding three hundred thousand dollars in the stock of such railroads, turnpikes, and plank roads, as the citizens of said county may determine to construct, and to levy a tax on the property within said county to pay the subscriptions, and to take a vote of the people of said county as to the propriety of making said subscriptions. *Be it therefore further enacted*, That the said county court of Shelby are hereby authorized and empowered, after giving twenty days' notice thereof by advertisement in Shelby News, at any time by said court deemed expedient, to take the vote of the qualified voters of said county as to the policy of said county becoming a subscriber of stock in such turnpike, plank, and railroad companies in said county, that may be formed under existing laws or hereafter incoporated, to construct any of the aforesaid roads, to any amount not exceeding three hundred thousand dollars; and provided a majority of all the voters qualified to vote for members of the General Assembly, who shall have cast their votes at said time designated in said notice, shall be in favor of said subscription; then and in that case it shall be the duty of said county court immediately to pass an order directing the presiding member of said court for the time being, on behalf of said county, to subscribe said stock in said roads, as the respective road companies shall be organized. That said county court shall subscribe in the stock of the Shelby Railroad Company, on that part of said road leading from Shelbyville to the junction with Louisville and

Frankfort Railroad, not more than four thousand shares, and in each turnpike and plank road five hundred dollars per mile for each and every mile, and the remainder of said three hundred thousand dollars in the stock of said Shelby Railroad Company, in that part of said road to lead from its terminus in Shelbyville in the direction of the town of Danville, in Boyle County, *provided* a company shall be incorporated to build a railroad from the said town of Danville; and said company shall locate said road in such manner as to meet and unite with the said road of the Shelby Railroad Company, *and provided* said subscription shall not exceed one hundred thousand dollars.

§ 23. That it shall be lawful for the said county court of Shelby, and they are hereby vested with full power and authority, for the purpose of making payment of said subscriptions in the stock of the said Shelby Railroad Company, and in the turnpike and plank roads, as authorized and provided for in this act, to levy and collect a tax not exceeding one half of one per cent per annum, *ad valorem*, upon all the property and estate subjected to the payment of State revenue by existing laws, within the said county of Shelby, on such annual valuation or assessment as taxes of the State are collected for the respective years in which said road-tax shall be collected, and apply said tax, as collected, to the payment of said subscriptions of stock in said companies.

§ 24. That the sheriff, or other officer collecting said tax, shall collect the same when collecting the State revenue, and shall pay the said road-tax to the president and directors of said company immediately upon the collection thereof; and such collecting officer, for failing to collect or pay over said tax, shall be liable and may be proceeded against in the same manner as for delinquencies in collecting or paying over the revenue; the tax-payers may, however, pay the tax direct to the president and directors of said company, if done within three months after the public notice shall be given that the tax for said year is due and unpaid. That the sheriff or other officer collecting said tax shall be entitled to and receive a commission upon the amount so collected by him of not more than one per cent, which shall be in full compensation for his said services.

§ 25. That the Shelbyville and Taylorsville Turnpike Road Company shall be fully entitled to receive, and the said county court shall subscribe in the stock of said company five hundred dollars per mile upon all that portion of said road that is now or may hereafter be completed, *provided* the subscription authorized by this act is sanctioned by the vote of the people of said county, as hereinbefore provided for; and it shall be lawful for those who have already subscribed stock, or shall hereafter receive certificates of the same, in lieu of paying the said road-

tax until his, her, it, or their *pro rata* proportion of five hundred dollars per mile, authorized to be subscribed, is exhausted; and said collecting officer shall take from said stockholder a certified statement thereof, which he shall return to the board of said company as a voucher. It shall be lawful for the president and directors of said company, and in their default any subscriber who has made or may make any part of said road, to apply to the county court of Shelby, and they are hereby authorized to appoint three discreet, impartial, and disinterested citizens, whose duty it shall be, after being duly sworn, to value and appraise the work done and performed in the construction of said road by said subscriber or subscribers, and report the same in writing to the board of said company, who shall thereupon issue to said subscriber or subscribers certificates of stock therefor.

§ 26. That each and every person who pays any part of said tax shall be entitled to his *pro-rata* share of said stock in the respective companies authorized and contemplated in this act, and into the treasury of which said tax is paid, and shall be entitled to demand and receive a certificate so soon as he shall have paid for a full, half, or quarter share, or shall produce transfers from those who have paid portions, so as to entitle him to a full, half, or quarter share.

§ 27. That the rate of tax on each one hundred dollars of stock in the Shelby Railroad Company, and in such turnpike or plank road as may be built in said county of Shelby, shall be at the same rate fixed by law on each one hundred dollars of taxable property for the State revenue; and the tax shall be paid by the president and directors thereof into the treasury of the State, on or before the first day of December in each year; and when the net profits of the stock in said road shall exceed ten per centum per annum on each one hundred dollars' worth of stock, the commonwealth reserves the right to put the same rate of tax on each one hundred dollars of such excess of net profits, and cause the same to be paid into the treasury each year in like manner; but the stockholders shall not be compelled to list such stock with the assessor; *provided*, that all the taxes which shall be paid into the treasury by said company shall pass to the credit of the sinking fund; *and it is also further provided*, that no tax shall be demanded of said companies until said roads are completed.

Approved March 15, 1851.

CHAPTER 554. *An Act for the benefit of the Shelby Railroad Company.*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the Shelby Railroad Company may have the further time of ten years to complete and finish their road; and for this purpose may use, exercise, and enjoy all the rights, privileges, and powers granted them in their original charter or any amendment to the same.

Approved February 15, 1858.

CHAPTER 1393. *An Act to amend the Charter of the Shelbyville Railroad Company, and to authorize certain counties to take stock in the same.*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the said company are authorized and empowered to extend their road through the counties of Anderson and Mercer, to or near Danville; thence along the most practicable route to the Virginia or Tennessee line, running through or near Lawrenceburg, and through or near Harrodsburg; and the further time of five years from the — day of May, 1871, is given to said company to construct their road to Danville. This amendment and the other amendments contained in this act are granted with the proviso that the present stockholders in said company shall not receive interest in stock on their present stock, but shall in all respects be placed upon the same terms and footing with those that may hereafter take stock in said company. It is a further condition of granting these amendments, that no part of the voluntary subscriptions made to the capital stock of said company since the year 1858 shall be collected from those persons who are taxed to pay subscriptions made by the county court of Shelby County under this act. This provision shall also apply to subscriptions made by persons now deceased, whose estates may be taxed in possession of their heirs or devisees.

§ 2. It shall be lawful for that portion of Shelby County embraced in the following-described boundary, viz: Beginning at a point on the Louisville and Frankfort Turnpike Road, at the intersection of the Bagdad and Harrisonville Turnpike, at the second toll-gate east of Shelbyville; thence north with said pike to the northern boundary of Clayvillage election precinct (Precinct No. 2); thence with said boundary in a western direction to the boundary of Shelbyville election precinct (Precinct No. 1); thence running with the boundary of said precinct around its northern line to a stone in the Shelbyville and Eminence Turnpike Road, near the residence of G. Reed, called the half-

way stone; thence in a western direction to a point at which the Westport Road crosses Bullskin Creek; thence in a straight line to Miller & Cinnamon's store; thence to the Jefferson County line, at a point on said line west of the residence of R. A. Wellman; thence south with said line to a point in the same west of the residence of William Brumley; thence to the intersection of the Shelbyville and Bardstown Turnpike Road with the Shelby and Spencer County line; thence in an eastern direction with said line to the intersection of Beech Creek; thence up said creek, and with its meanders to the crossing of the Shelbyville and Mt. Eden Road, near Salem Church; thence in an eastern direction to Beech-creek Meeting-house; thence to the Hardinsville election precinct line (Precinct No. 8), at or near Daniel Brumley's blacksmith shop; thence with said line in a northern direction to the Louisville and Frankfort Turnpike Road, and with said road to the beginning; and for the counties of Anderson, Mercer, and Boyle to subscribe to the capital stock of said company as hereafter specified.

§ 3. The portion of Shelby County embraced in the boundary aforesaid may subscribe for any amount of stock not exceeding three hundred thousand dollars. The county of Anderson may subscribe for any amount of stock not exceeding one hundred and fifty thousand dollars. The county of Mercer may subscribe for any amount of stock not exceeding two hundred and fifty thousand dollars. The county of Boyle may subscribe for any amount of stock not exceeding one hundred and fifty thousand dollars. The subscriptions of the county of Anderson shall be made upon the condition that the said subscriptions shall be made by the said portion of Shelby. The subscriptions of the county of Mercer shall be made upon the condition that the subscriptions shall be made by the county of Anderson and said portion of Shelby. The subscriptions of the county of Boyle shall be made upon the condition that the said subscriptions shall be made by the counties of Anderson and said portion of Shelby. The same shall be subject to further conditions as follows, viz: That the subscriptions of the county of Anderson shall be expended in the construction of said road through the county of Anderson; the subscription of the county of Mercer shall be expended in the construction of said road south of Lawrenceburg, and the subscription of the county of Boyle shall be expended in the construction of said road south of Harrodsburg. To secure compliance with said conditions the bonds hereinafter provided for, except the bonds of said portion of Shelby, shall not be delivered until the road shall be completed as far as Shelbyville, and the company shall be ready to begin work upon the sections embraced in the several limits aforesaid. Upon the

written application of the president and directors of said company of ten tax-payers of any of said counties, the county judge of such county shall, within thirty (30) days thereafter, cause a vote of the legal voters residing in the county or portion of county to be taxed, to be taken at the several places of voting therein, to ascertain whether the voters of said counties, or portion of Shelby County, are in favor of said subscription; and it shall be the duty of the county judge to cause at least twenty days' notice to be given of the time at which said vote will be taken and of the proposition to be voted upon; and it shall be his duty, in due time, to appoint judges and other officers to conduct said election. Such elections shall be held as elections for representatives to the General Assembly, and the returns thereof shall be made, within ten days after the election, to the county clerk of the county.

§ 4. At the next term of the county court after the return of said vote, the poll-books shall be examined by the county judge, county clerk, and county attorney, and the result of said vote for and against said subscription shall be entered on the record of said court.

§ 5. If a majority of the votes cast shall be in favor of said subscription, it shall be the duty of the county judge forthwith to cause the subscription to be made in the name of said county or portion of Shelby County, as the case may be.

§ 6. That where any such subscription to the capital stock of said company shall have been ordered, and the conditions aforesaid complied with, bonds shall be executed in the name of and under the seal of or scroll of said portion of Shelby County, or such counties, as the case may be, in such form and in such amounts; the entire amount of said bonds not to exceed the sum subscribed, and payable at such places, and bearing interest payable semi-annually at such rates (not exceeding eight per centum per annum), as the president and directors may elect. The bonds shall be due and payable twenty years from their date, with the privilege reserved to the said counties to pay them after three years from date. The bonds shall be signed by the judge of the county court and countersigned by the county clerk. When so executed said bonds shall be delivered to the president and directors of said company, in payment of said subscription, and they may be by them negotiated, hypothecated, or sold, upon such terms and at such times as may by said president and directors be deemed expedient, and may be transferred by indorsement.

§ 7. That when any such subscription shall have been made, it shall be the duty of the county judge and the justices of the peace of the precincts or the counties in which the vote is taken

to levy annually a direct tax upon all the property in such county, or portion of county, subject to taxation for State revenue, to pay the interest when due, and the principal at maturity; and they may levy a tax to pay any portion of said bonds at any time after three years; *provided*, that no greater tax than one per cent shall be levied in any one year, except to pay the bonds at maturity. The taxes herein provided to be collected to pay the interest and principal of said bonds shall be collected by the sheriff, or such other person as the county judge and justices of the peace may designate, who shall execute bond conditioned that he shall faithfully discharge his duties and pay over the money collected by him. He shall collect the tax in pursuance with and according to the law for collecting the revenue, and shall receive such compensation as shall be voted him by the county judge and justices of said counties and said portion of Shelby, not exceeding three per centum, which amount shall be included in the levy. He shall pay over the taxes to a treasurer to be appointed by the county judge and justices. The treasurer shall execute a similar bond to that of the collecting officer, and the compensation allowed him, not exceeding one per cent, shall also be included in the levy of taxes. The collecting officer shall execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when they amount to fifty dollars or more shall entitle the holder, upon presentation to the proper officers of the company, to certificates of stock, at the rate of one share for fifty dollars and every multiple of fifty.

§ 8. The said treasurer shall make annual settlement with the collecting officer, and report the same to the county court, and the county court shall make annual settlements with the treasurer.

§ 9. The several counties and portion of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders.

§ 10. It shall be lawful for the two election precincts in the county of Boyle, known as precincts Nos. 3 and 4, to take the stock herein provided to be taken by the whole county, or they may take less than one hundred and fifty thousand dollars, and the deficiency may be supplied by individual subscriptions in said county; *provided*, that the said subscriptions shall be expended only as provided for the county or precinct subscriptions. If from any cause the said portion of Shelby County should fail to make a valid subscription as herein provided, the election precincts known as Precincts Nos. 1, 2, 5, and 6 may make the said subscription, and

Precinct No. 1 may take forty thousand dollars of the same, in addition to a *pro rata* of the remaining two hundred and sixty thousand dollars.

§ 11. If the question of making the subscriptions aforesaid shall be submitted to the voters of any of said counties, or portion of counties, and they should fail to approve of said subscription, the sense of the voters thereof may be taken a second time by vote; *provided*, that it shall not be done within less than one year after.

§ 12. No contract that the president and directors of said company may make with the Louisville, Cincinnati and Lexington Railroad Company, or any other railroad, shall be valid until the same shall be ratified by the stockholders of this company.

§ 13. In taking the vote upon the question of said subscription in the county of Shelby the polls shall be opened at the places of voting in all of the precincts of said county except Precincts Nos. 3 and 8.

§ 14. That the citizens of the fifth voting precinct in Anderson County shall not be allowed to vote upon the subject of this railroad, nor shall the citizens of said precinct be taxed to build the same or any part thereof.

§ 15. This act shall take effect from and after its passage.

Approved February 3, 1869.

CHAPTER 626. *An act to amend an act, entitled "An act to amend the Charter of the Shelbyville Railroad Company, and to authorize certain counties to take stock in the same."*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the county of Mercer be and is hereby authorized and empowered to subscribe a sum not exceeding four hundred thousand dollars ($400,000), and the county of Boyle a sum not exceeding two hundred and fifty thousand dollars, to the capital stock of the Shelby Railroad Company, upon the terms, conditions, and in the manner prescribed in the act to which this is an amendment.

§ 2. That Shelby County be and is hereby authorized and empowered to subscribe one hundred thousand dollars ($100,000) to the capital stock of said company, upon the terms, conditions, and in the manner that a part of said county described in the second section of said act was authorized by said act to subscribe to the capital stock of said company, *provided, however*, that said subscription shall only be used in the construction of said road east or southeast of Shelbyville, along the most practicable route to Lawrenceburg or Harrodsburg; *and provided further*,

that said subscription shall not be valid, and no tax shall be collected to pay the same until the county of Mercer shall have subscribed at least three hundred and fifty thousand dollars, and the county of Boyle at least two hundred thousand dollars, as provided herein; *it is further provided*, that when a valid subscription of one hundred thousand dollars shall be made as provided herein, it shall be in lieu of that amount voted by the county of Shelby to the Cumberland and Ohio Railroad Company, upon the condition that it should be given or subscribed to the Shelby Railroad Company; and the subscription of the county of Shelby to the Cumberland and Ohio Railroad Company shall then be reduced to three hundred thousand dollars. In taking the vote under this section, the polls shall be opened at all of the precincts in said county in which any of the voters within the aforesaid boundary may reside, *provided*, that this act shall not be construed so as to interefere with any of the rights or privileges conferred upon the Cumberland and Ohio Railroad Company, nor so as to alter or change the subscription, or the terms thereof, made by Shelby County to the Cumberland and Ohio Railroad Company. And in the order of submission to the voters of Shelby County mentioned herein, it is to be expressed in the submission, and the subscription voted, upon the condition that the Cumberland and Ohio Railroad Company shall have the right to exchange one hundred thousand dollars of her stock, subscribed by the county of Shelby, for the same amount of stock in the Shelbyville Railroad Company, so as to comply with the terms and conditions upon which Shelby County voted the four hundred thousand dollars to said Cumberland and Ohio Railroad Company.

§ 3. That when any county or part of a county, city, town or precinct, shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the county judge and all of the justices of the peace of the county; stock owned by a part of a county or a precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and the several bodies may designate a suitable person or persons as their proxies to represent them in any meeting of the stockholders of said company. It shall be the duty of the county judge to call together at the county-seat the justices entitled to vote, and to cause their action to be spread upon the records of the county court.

§ 4. In the construction of said railroad, the company may change the location heretofore made, not to exceed one mile

from the original line, without forfeiture of rights of way heretofore granted; nor shall lapse of time since the grant of a right of way be a bar to the assertion of all the rights of the company under such grant; but damage or injury to improvements made since the grant shall be paid by the company, and the same shall be assessed in the manner provided by its charter. This section shall apply to all written relinquishments of right of way, whether by deed or bond.

§ 5. That so much of the act to which this is an amendment as requires said company, in constructing their roads through the counties of Anderson, Mercer, and Boyle, to run through or near their re-spective county-seats, is hereby repealed, *provided, however*, that the subscription of any county made, or that may hereafter be made, upon the condition that said railroad shall be so constructed as to run within the corporate limits of the county-seat of such county, or within a prescribed distance therefrom, named in the order of the county court submitting the question, shall not be valid and obligatory unless such condition is complied with.

§ 6. Any person owning bonds issued under this act, or the act to which this is an amendment, may present them to the county clerk of the county or part of a county issuing them, and have them registered in a book to be kept by him for that purpose. The clerk shall write on the back of each bond the fact and date of registry; and thereafter bonds so registered shall only be transferred by indorsement, and by acknowledgement thereof before a county clerk or notary public, or by proof of two attesting witnesses, and of which transfer the clerk shall make record in said book. All other bonds shall pass by delivery.

§ 7. The holder and owner of any registered bond may present the same to the clerk of the county issuing the same, and have said bond again made payable to bearer by the said clerk indorsing on the back thereof that the registry of said bond shall be canceled, which certificate shall be attested by the clerk over the seal of the county. The clerk shall receive a fee of fifty cents for each registry, and for each assignment and registry thereof, *provided*, that nothing in this act shall be so construed as to authorize said company to sell said bonds for less than seventy-five cents on the dollar.

§ 8. This act shall take effect from and after its passage.

Approved March 11, 1870.

CHAPTER 257. *An act to amend an act, entitled "An act to amend the Charter of the Shelbyville Railroad Company, and to authorize certain counties to take stock in same."*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the part of Shelby County embraced in the boundary given in the second section of an act, entitled "An act to amend the Charter of the Shelbyville Railroad Company, and to authorize certain counties to take stock in the same," approved February 3, 1869, have the corporate name of "The Shelby Railroad District of Shelby County;" and by that name may sue and be sued.

§ 2. That this act be in force from and after its passage.

Approved February 26, 1873.

CHAPTER 263. *An act to amend an act, entitled "An act to amend the Charter of the Shelby Railroad, and to authorize certain counties to take stock in same," approved February third, one thousand eight hundred and sixty-nine.*

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the Shelby Railroad District of Shelby County is hereby authorized and empowered to issue its bonds, not exceeding two hundred and twenty thousand dollars ($220,000) in denominations of five hundred dollars and one thousand dollars, as the justices of the peace of said district and the county judge of said county may determine.

§ 2. Said bonds shall bear interest at the rate of five per centum per annum, payable semi-annually, evidenced by coupons attached thereto, and the principal shall be paid in twenty years after the date of issue, with the privilege reserved to said district to pay the principal and cancel the coupons after three years from date. The said bonds shall be signed by the county judge and attested by the county court clerk with the seal of the county, and the coupons shall be signed by the county court clerk. The county judge shall receive a reasonable compensation for signing said bonds, not exceeding fifty dollars, and the county court clerk shall receive for his services for attesting said bonds and signing the coupons a sum not exceeding one hundred and fifty dollars, to be fixed by the county judge and justices of the peace of said district. There shall be no charge for the use of county seal used upon said bonds or coupons, either by the clerk or the Commonwealth of Kentucky.

§ 3. The bonds and coupons shall be payable at such place in the United States as the county judge and said justices of the

peace may designate; and they shall be negotiated and sold at not less than par value, and the proceeds shall be applied exclusively to the payment and redemption of the six-per-cent bonds issued by said district under the authority of an act approved May the fifth, one thousand eight hundred and eighty.

§ 4. The payment of principal and interest of said bonds shall be provided for by an annual levy of a tax on all of the property in said Shelby Railroad District, in all respects as required by an act approved February third, one thousand eight hundred and sixty-nine, to which this act is an amendment, it being the intention of this act to enable said district to substitute five-per-cent bonds, herein provided for, for the six-per-cent bonds heretofore issued.

§ 5. This act shall take effect from its passage.

Approved February 29, 1884

An Act to authorize Railroad Companies to make certain contracts with each other. Approved January 22, 1858.

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That all railroad companies in this Commonwealth shall have power and authority to make with each other contracts of the following character: 1st. For the consolidation of either the management, profits, or stock of any two or more companies the roads of which are or shall be so connected as to form a continuous road, either temporarily or permanently. 2d. For the leasing of one company to another, provided the roads so leased shall be so connected as to form a continuous line. 3d. For the completion, in whole or part, of the unfinished road of any company. 4th. For giving a common name and style to any continuous road belonging to any two or more companies; *Provided, however*, that all such contracts shall be approved by a majority in interest of all the stockholders of each of the contracting companies at some stated or called meeting of the same.

§ 2. That the called meeting of stockholders, provided for in the first section, shall be called by the president and directors of the company, and notice of the time and place thereof, and of the purpose of such meeting shall be advertised in one or more newspapers of general circulation in the county where the principal office of such company is there kept, for at least two weeks before such meeting.

Office Supreme Court U. S.
FILED.
APR 20 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

Nos. 325-326.

HENRY H. HANCOCK, Appellant.

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND THE SHELBY RAILROAD DISTRICT OF SHELBY COUNTY, Appellees.

THE SHELBY RAILROAD COMPANY, Appellant.

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY AND THE LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., Appellees.

Appeals from the Circuit Court for the District of Kentucky.

Brief for Appellees.

J. C. BECKHAM,
Counsel for Appellees.

SHELBY SENTINEL PRINT, SHELBYVILLE, KY.

Supreme Court of the United States.

No. 325.—Henry H. Hancock, - - - - *Appellant.*

vs.

The Louisville and Nashville Railroad Company and the Shelby Railroad District of Shelby County, - - *Appellees.*

No. 326.—The Shelby Railroad Company, - *Appellant.*

vs.

The Louisville & Nashville Railroad Company and The Louisville, Cincinnati & Lexington Railway Company, *Appellees.*

BRIEF FOR APPELLEES.

Statement.

May it please the Court: An agreed order has been entered in this Court that these two causes be heard together.

Hancock, the appellant, in No. 325, is a stockholder in the Shelby Railroad Company, the appellant in No. 326.

The Shelby Railroad Company is a corporation, created and existing by virtue of an act of the General Assembly of Kentucky, approved March 15th, 1851. This act was subsequently several times amended.

The appellee, the Louisville & Nashville Railroad Company, was incorporated by an act of said General Assembly, approved March 4th, 1850, and the appellee, the Louisville, Cincinnati &

Lexington Railway Company, was also incorporated under the laws of Kentucky.

The Shelby Railroad is about eighteen miles long, and extends from Anchorage, in Jefferson county, to Shelbyville, in Shelby county.

On the 16th day of July, 1879, the Shelby Railroad Company, by a contract of that date, leased its road to the Louisville, Cincinnati & Lexington Railway Company for a period of thirty years, at an annual rental of $15,000, payable in equal monthly instalments, computing from August 1st, 1879. (In a certain event the rent was to be reduced to $13,000.00 per annum, but as that event has never happened it is not necessary that that provision of the contract should be further noticed.) After the execution of the lease, the lessee sublet said road, or assigned the lease to the Louisville & Nashville Railroad Company.

The relief sought by Hancock in No. 325 is the setting aside or cancellation of that lease. Precisely the same relief is sought by the Shelby Railroad Company in No. 326. Hancock filed his bill of complaint in the Circuit Court December 3rd, 1886. His bill was finally dismissed, on demurrer, March 27th. 1888.

On August 4th, 1888, the Shelby Railroad Company filed its bill of complaint, seeking the same relief that had been denied to Hancock in the preceding March, and its bill was finally dismissed January 7th, 1889. Both bills were dismissed because they contained no equity and stated no cause of action. Both appeals to this Court were prayed and granted on the same day, January 7th, 1889. Hancock assails the lease in his pleading on two grounds, viz: That it was made without legislative authority, is *ultra vires*, and therefore null and void; and 2nd, that it was not ratified by a majority of the stockholders of the Shelby Railroad Company.

The Shelby Railroad Company, in its pleading, assails the

lease on the sole ground that it had never been ratified by a majority of its stockholders. It alleges as a reason why the lease had not been ratified by a majority of its stockholders, that the Shelby Railroad District of Shelby county (appellee) at the meeting of the stockholders that ratified the lease had voted $267,775 in favor of its ratification, and that said district was not a stockholder in said company, owned no stock in it, and had no right to cast any vote, and without its vote a majority of the stock had not been voted in favor of the lease.

On the other hand, our contention is that there was legislative authority for the lease, and also that the lease was properly and lawfully ratified by the stockholders of the Shelby Railroad Company, and that the Shelby Railroad District of Shelby county was, at the time of the meeting of the stockholders, a stockholder in said company and entitled as such to vote to the extent it did vote at said meeting, and that said lease is a valid contract, binding not only upon the Shelby Railroad Company but upon each and all the stockholders thereof, including the appellant, Hancock.

Neither of these contracting railroad companies had express authority under their respective charters to make this contract of lease. I admit that without some legislative authority therefor, express or implied, neither company could legally enter into such a contract. Hence I must show the authority. ×

Before proceeding, however, to a discussion of the cases on the merits, I desire to make the point that the appellant, Hancock, has not now the right to prosecute his appeal. The cases are heard together in this Court. The Court, therefore, in determining the question now presented, will look into both records. It will be observed that Hancock sues the Shelby Railroad Company and others as a stockholder of said company, and in right

× In Case No. 326 the legislative authority is not put in issue, so I must make it in this case.

of said company. The allegations of his bill are intended to bring him within the requirements of rule of practice 94.

He alleges in substance that he has notified and requested the Shelby Railroad Company "to institute an action against the Louisville & Nashville Railroad Company, and the Louisville, Cincinnati and Lexington Railway Company for the cancellation and setting aside of the above described lease," but that by the Board of Directors of said company it was resolved that said company "would not institute said action." (See record 325, page 6.) He further alleged that he notified said company to bring said suit, and that unless it brought said suit in the name of said company, and for the benefit of said company, and its stockholders, "your orator Hancock would bring said suit in his own name as a stockholder, and make said company a defendant to said action." "Notwithstanding said notice, and because of the above proceedings of the Board of Directors, the said Shelby Railroad Company has hitherto and continues to fail and refuse to institute said action." (See record page 7.)

In his prayer for relief he asks "that the aforesaid lease may be declared and held by this honorable Court to be null and void," and that the lessee be required to account with him and the other stockholders of the Shelby Railroad Company for the use of said property, and that the Shelby Railroad Company be required to retake possession of its said railroad, &c. His suit, therefore, was a suit for himself and the other stockholders and for the benefit of the Company. In order to maintain his action at all it was necessary, under rule 94, for him to allege, in substance, what he did allege in regard to his efforts to secure such action as he desired on the part of the managing directors, and their failure to take such action.

From the bill of complaint of this same Shelby Railroad Company now before this Court in No. 326, it appears that said

Railroad Company has *now* taken the precise action and brought the precise suit, the failure to do which is a necessary element in Hancock's right to any relief. The prayer of its petition is "that the aforesaid lease may be declared and held by this honorable Court to be null and void," and that the lessee be compelled to deliver unto your orator the immediate possession and control of said railroad, &c."

The two suits contemplate and seek exactly the same result. One is by the Company. One is by a stockholder of the Company. Both are for the benefit of the same party—the Company. I insist that the pendency in the same court of the suit by the Company shall abate the suit for its benefit by the stockholders. If the suit by the Company had been filed in the court below, before the termination of the suit by Hancock, can there be any doubt that, in that court, the pendency of the former would have resulted in the abatement of the latter? I respectfully insist that the same result shall follow here.

ARGUMENT.

AS TO LEGISLATIVE AUTHORITY TO MAKE THE LEASE.

The first section of the act to amend the charter of the Shelby Railroad Company, approved March 10th, 1854, provides that "the President and Directors of the Shelby Railroad Company, or a majority of them, are hereby authorized and empowered to form by contract a union of said Company with any other railroad company, or to sell and transfer and convey, when sold, all the assets, real and personal estate, rights and privileges of said Company, and upon such terms and conditions as have been, or may hereafter be, sanctioned and approved by the stockholders owning a majority of the stock of said Company; and said sale and conveyance, when made, shall divest the said Shelby Railroad

Company of all chartered rights, and it shall cease to exist as a company; and the purchaser or purchasers shall be fully invested with all the chartered privileges now possessed by the Shelby Railroad Company, under and by virtue of this and all previous acts of incorporation." (See appendix.)

Sec. 12 of the act amending the charter of the Shelby Railroad Company, approved Feb. 3d, 1869, provides that "no contract that the President and Directors of said Company may make with the Louisville, Cincinnati & Lexington Railroad Company, or any other railroad, shall be valid until the same shall be ratified by the stockholders of this company." (See Appendix).

Neither of these two sections gives the express power to make this lease and if the power exists by virtue of either, or of the two together, it is because it is implied from, or included in, the greater power to sell. The first of these sections certainly vests in the Shelby Railroad Company the power to sell its railroad absolutely, and to make conveyance thereof. Here is power for the perpetual transfer of the title. Does not this necessarily include the lesser power to transfer the title for the period of thirty years, as done in this lease? Is there any necessity that there should be such a judicial construction of this statute as would vary the well-known rule that the greater includes the lesser power? It will be observed, too, that fifteen years after the grant of this power to sell, in the amendment of 1854, the Legislature, in the 12th section of the amendment of 3rd of February, 1869, provides that any "contract" made by the Shelby Railroad Company with the Louisville, Cincinnati & Lexington Railroad Company, or any other railroad, shall be ratified by the stockholders, etc. The word here used is not any "sale" made by said company, but any "contract" made by said com-

pany, and this language, I contend, is a legislative construction of Sec. 1, of the act of 1854, that it gave power to make a "contract" other than a contract of sale.

But if these acts should be deemed by the Court insufficient to authorize the lease, the general law passed by the General Assembly of Kentucky, entitled "an act to authorize railroad companies to make certain contracts with each other," and approved January 22nd, 1858, expressly gives authority for the making of a contract of lease like this. Said act is as follows:

SEC. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*: That all railroad companies in this Commonwealth shall have power and authority to make with each other contracts of the following character: 1st, for the consolidation of either the management, profits or stock of any two or more companies, the roads of which are, or shall be, so connected as to form a continuous road either temporarily or permanently. 2nd, for the leasing of one company to another, provided the road so leased shall be so connected as to form a continuous line. 3rd, for the completion in whole or in part of the unfinished road of any company. 4th, for the giving a common name and style to any continuous road belonging to two or more companies: provided, however, that all such contracts shall be approved by a majority in interest of all the stockholders of each of the contracting parties at some stated or called meeting of the same.

SEC. 2. That the called meeetings of stockholders provided for in the first section, shall be called by the President and Directors of the company and notice of the time and place thereof, and of the purpose of such meeting, shall be advertised in one or more newspapers, of general circulation in the county where the principal office of such company is then kept, for at least two weeks before such meeting."

Hancock claims that this lease is not covered by the provisions of this statute, because: 1st, as alleged in his amended bill, "the said road bed of the Shelby Railroad Company does not and

cannot compose any part of a 'continuous line' between the city of Lexington and the city of Louisville," nor "between the city of Lexington and the city of Newport" and "that the road from Anchorage to Shelbyville does not, in any sense, form any part of a continuous line between any of the termini of the Louisville, Cincinnati & Lexington Railroad."

It is evident, from these quotations, that complainant construes the statute to mean that no leased road will form a "continuous line" unless it simply fills a gap between two parts of another road. That surely cannot be the meaning of the phrase "continuous line." It seems manifest that by that provision the Legislature meant to prevent one railroad company from leasing its road to another company unless the two roads were physically connected. If detached and separate, the one from the other, neither could lease to or from the other. It was to permit the *extension of a system*, but not to build up another and independent system of roads by way of lease. It could never have been the intention of the Legislature to prevent the extension of the main road or any of its branches by the lease of such extended road, whether that extension was but an addition at the termini of the main or branch road, or whether it was an addition attached to the main line or branches between the termini. In this case the leased road is, and was at the execution of the lease, physically connected with the main line near Anchorage, about twelve miles from Louisville, and the trains over the leased road, which extends from Anchorage to Shelbyville, do not pass simply between these two points, or alone on the leased road, but they make, and by the terms of the lease (see lease on pages 8, 9 and 10 of record 325) are compelled to make, continuous trips, two each day, from Shelbyville to Louisville, and from Louisville to Shelbyville, over both the main line and the leased line. It

would seem that this is conclusive evidence that the leased road does form, and, by the terms of the lease, was intended to form, a "continuous line" between Louisville and Shelbyville, and that such continuous line is what is contemplated by this statute.

I cannot better conclude my argument on this point than by quoting from the opinion of the learned judge who decided the case in the court below. The Court said:

"The allegation of the bill is that the said road of the Shelby Railroad Company, which was so attempted to be leased, as aforesaid, was not so connected with the said road of the Louisville, Cincinnati and Lexington Ralway Company as to form a continuous line.

"The lease, which is made part of the bill, shows that these two roads, Shelby Railroad and the L. C. & L. Railroad, formed a junction near Anchorage and that from this junction the L. C. & L. Railroad ran to Louisville. This lease prohibits the L. C. & L. Railroad Co., from charging for freight or passengers to and from points on the Shelby Railroad any higher rates than those charged for corresponding distances from Louisville on its own road and it required that the L. C. & L. Railroad should run at least two daily trains, except Sunday. These provisions clearly show the relative position of these two roads, even if the Court may not know judicially the geographical location of these two roads. The allegations of the bill are not intended, I presume, to deny the physical junction of the two roads, but rather that this junction made a continuous line within the meaning of this act. The contention is that this statute only authorizes railroad companies to lease those roads which may connect with theirs at the main or final terminal points and not those railroads forming a physical junction with its road at other than main or final terminal points. This construction would authorize the Shelby R. R. Co. to lease the L. C. & L. Railroad from its junction near Anchorage to Louisville, but not the L. C. & L. Railroad Company to lease the Shelby Railroad from the junction to Shelbyville. This authority may not include parallel roads which do not join, or if they do physically join, if thereafter they do not

form a continuous line of railroads, but I am clearly of the opinion that this power to lease does include such a line of road as the Shelby Railroad, which is properly a branch road and forms a continuous line by connecting Shelbyville and Louisville."

It may be contended here by counsel for Hancock, as was contended in the court below, that this act of Jan. 22nd, 1858, was repealed by the adoption of the General Statutes which went into effect December 1st, 1873. The General Statutes provide "that all statutes of a general nature in force when the General Statutes take effect, and which are repugnant thereto, are hereby repealed, except as follows: "All statutes of a merely local relation to any county, city, or town, or relating to the powers, privileges and franchises of any corporation." (See General Statutes of Kentucky, Art. 1, Sec. 2, and sub-Sec. 2, page 157.) On the subjects provided for in the act of 1858, the General Statutes are silent, and there can, therefore, be no repugnancy between that statute and the General Statutes. This act of 1858 relates to the powers, privileges and franchises of railroad corporations, and is within the express exception of sub-section 2, of section 2, of article 1, of the General Statutes.

The legal effect of this act is to operate as an amendment to the charter of every railroad company in the State that, by acting under it, accepts the benefit of its provisions, as was done by the lessor and lessee in this case. The appellant, Hancock, also insists that the lease is invalid, even though the leased road forms a "continuous line" with the the road of the lessee, because the required notice of the meeting of the stockholders, as provided by the 2nd section of the act of 1858, was not given. That notice was wholly immaterial if a majority of all the stockholders were present and approved the lease. If a majority of the stock was there at the meeting and voted for the lease, the absence of the notice could not possibly have affected the result, as nobody

was either benefitted or injured by the want of notice. It is evident also from the allegations of the bill that said meeting was a "stated" or regular meeting of the stockholders and at such meeting no notice is required by the act to be given Notice is necessary only at "called" meetings. (See section 2 of act of 1858.) In any event the bill should be construed most strongly against complainant, and it certainly does not appear from the bill that the meeting that ratified the lease was other than a regular or "stated" meeting. Hence no notice was necessary.

2nd. This brings us to the consideration of the principal question in controversy between these parties, viz: Was this lease ratified by a majority of the stockholders of the Shelby Railroad Company? And the answer to this question depends upon the further question: Was the Shelby Railroad district of Shelby county at the time of the making of this contract of lease, a stockholder in the Shelby Railroad Company, and as such, a legal voter at stockholders' meetings?

The Shelby Railroad district of Shelby county was created by an amendment to the charter of the Shelby Railroad Company, approved February 3rd, 1869. The boundaries of the district are described in the second section of said act and they are correctly given by appellant, Hancock, in his original bill. (See record 325, page 2). By the 3rd section of said amendment the said district called therein "the portion of Shelby county embraced in the boundaries aforesaid," was authorized "to subscribe" to the capital stock of the Shelby Railroad Company "for any amount of stock not exceeding three hundred thousand dollars," and in said section it was further provided "that upon the written application of the President and Directors of said company and of ten tax payers of any of said counties, the County Judge of such county shall, within thirty (30) days thereafter, cause a vote of

the legal voters residing in the county or portion of county to be taxed, to be taken at the several places of voting therein, to ascertain whether the voters of said counties or portion of Shelby county are in favor of said subscription, and it shall be the duty of the County Judge to cause at least twenty days notice to be given of the time at which said vote will be taken and of the proposition to be voted upon, and it shall be his duty in due time to appoint judges and other officers to conduct said election." Provision is made in section four for counting the votes cast, and in section five it is provided that "if a majority of the votes cast shall be in favor of said subscription it shall be the duty of the County Judge forthwith to cause the subscription to be made in the name of said county, or portion of Shelby county, as the case may be." Section six provides that "where any such subscription to the capital stock of said company shall have been ordered and the conditons aforesaid complied with, bonds shall be executed in the name of and under the seal of, or scroll of, said portion of Shelby County or said counties, as the case may be, in such form and in such amounts, the entire amount of said bonds not to exceed the sum subscribed." * * * "The bonds shall be signed by the Judge of the County Court and countersigned by the County Clerk. When so executed said bonds shall be delivered to the President and Directors of said company in payment of said subscription and they may be by them negotiated, hypothecated or sold upon such terms and at such times as may by said President and Directors be deemed expedient and may be transferred by indorsement." In section seven provision is made for the levy and collection of a tax to pay the accruing interest on said bonds and the principle at maturity. The tax provided for is "annually a direct tax upon all the property in such county or portion of county subject to taxation for State revenue." * * "The collecting officer shall execute to each person a receipt for

the amount of taxes paid by him, which shall be assignable, and when they amount to fifty dollars or more shall entitle the holder upon presentation to the proper officers of the company, to certificates of stock at the rate of one share for fifty dollars and every multiple of fifty".

Section 9 provides that "the several counties and portions of counties shall not vote the stock for *which certificates may be issued* to the taxpayers, but the same shall be voted by the individual stockholders." Section 6, of the original charter, approved March 15th, 1851, provides that in stockholders' meetings, in which directors are authorized to be elected, "and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for each share owned by him, her or *it*.

Section 3 of the amendment, approved March 11th, 1870, provides "that when any county, or part of a county, city, town or precinct shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the County Judge and all of the justices of the peace of the county. Stock owned by a part of a county or a precinct, by the County Judge and by the justices of the peace residing in the district, or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and these several bodies may designate a suitable person or persons, as their proxies, to represent them in any meeting of the stockholders of said company. It shall be the duty of the County Judge to call together at the county seat the justices entitled to vote and to cause their action to be spread upon the records of the County Court." The amendment of Feb. 26th, 1873, provides as follows:

"SEC. 1. That the part of Shelby county embraced in the boundary given in the second section of an act entitled 'An act to amend the charter of the Shelbyville Railroad Compand and to authorize certain counties to take stock in the same, approved February 3rd, 1869, have the corporate name of 'The Shelby Railroad District of Shelby County,' and by that name may sue and be sued."

SEC. 2. "That this act be in force from and after its passage."

As to whether a majority of the stock of the Shelby Railroad Company voted in favor of the ratification of the lease depends upon the question as to whether this Shelby Railroad District of Shelby county had the right to vote on the question of rejection or ratification, and this is to be determined from the construction to be given to the sections of the charter and amendments that I have quoted. The Legislature, it seems, omitted, until the amendment of March 11th, 1870, to give any county or portion of county, city, town or precinct, that subscribed to the capital stock of the company, the express right to vote its stock, nor until said act of 1870 did the Legislature designate any agency to cast such vote, if the right to vote existed. From this omission it is contended by appellants that such right did not exist until the act of 1870 and, further, that said act is in conflict with that provision of the Federal Constitution that prohibits the State from passing laws impairing the obligation of contracts. Appellants contend that the amendment of February 26th, 1873, giving the portion of Shelby county embraced in the described boundary the name, "The Shelby Railroad District of Shelby County," is also in conflict with the same constitutional provision.

The right of this district to vote did not depend on either of these amendments. Its right to vote existed prior to, and independent of, both of them. It subscribed stock and paid for it by delivering its bonds as provided in the charter of the company.

Section 6, of the original charter above quoted, says that "each stockholder shall be allowed one vote for each share owned by him, her or it." This section clearly contemplates the ownership of stock by persons other than natural persons. The word "it," as used in that section, is manifestly used in contradistinction to the natural persons intended by the use of the words "him" and "her." No amendment to the charter in any wise placed any limitation on the right here given, whether the persons were natural or artificial. But even without this express legislative provision, making every shareholder a voter, the right of a shareholder to vote ought to exist, and, I believe, would exist. The subscription for stock by the district imposed the obligation to pay. The payment of the subscription gave to the obligor making it an interest in the control and business of the corporation, and an interest in the business could only be expressed or asserted by a vote. The right to vote stock is a necessary sequence to ownership of stock. Voting is an incident of ownership.

The second section of the amendment of February 3rd, 1869, established the boundaries of "the portion of Shelby county" that made the subscription and delivered the bonds in payment thereof. If default had been made in the payment of principal or interest of these bonds can there be any doubt that "the portion of Shelby county" that had so delivered them would have been liable to suit for payment of same even before it received the name, "The Shelby Railroad District of Shelby County," by the act of 26th of February, 1873? This act had no other object and no other or further effect than to give a legal or corporate name to an artificial entity already in existence. The thing or being was already living. This act named it. The act itself does not intimate in either title or body that a corporation is thereby being created. It simply provided that, the part of Shelby county embraced in the boundery given in the second

section of the act of 1869 should have "the corporate name of the Shelby Railroad District of Shelby County."

Neither this act or the act of March 11th, 1870, gave, or purported to give, anybody any substantive rights. The act of 1870 had no other object and no other or further effect than to designate what officers of the county, city, town or "district" should represent it in the stockholders' meetings. Certainly it was not by virtue of these amendments, or of both of them together, that the "portion of Shelby county," this "district," either made its subscription to the capital stock of the railroad company or issued and delivered its bonds in payment thereof. Both these things, unquestionably, were done by virtue of the previous act of Feb. 3d, 1869. This district, by its subscription and the payment thereof, to the amount of three hundred thousand dollars, invested, in common with all the other subscribers and stockholders, in this railroad company. Nobody disputes that in this common enterprise other stockholders had, and properly exercised, the right to vote, that they were legal voters solely because stockholders. On general principles every stockholder could vote unless the right is expressly denied to him. The company is composed of the stockholders. By what law or logic is one stockholder denied the right to vote and another permitted to vote? What class is within and what class without the charmed circle? By virtue of section seven of the act of 1869 the taxpayer is given the right to stock to the extent of taxes paid by him in paying the interest on bonds, and the very giving of this right to him, by implication, denies to him the right to stock acquired by the district in payment of its bonds, and thus this stock, the unpaid principal of the bond, is without representation at all, unless it is represented by the district. Upon what principle of justice or equality can representation to this part of the stock be denied and given to all the rest?

In Kentucky, railroads have in the main been built by counties, municipal corporations, and sections or parts of counties, by subscriptions, like the one now being considered. Rarely have they been built by private subscriptions alone. If a part of a county is not a stockholder, then upon no principle of reason or logic can an entire county or a city be a stockholder, and if this were held we should have the anomaly of a railroad corporation whose success had been made and established by stockholders, who could take no part in its control.

It might be admitted to be true that no one had the right to cast the vote of the district by virtue of any express provision of the act of 1869, yet that question is wholly immaterial on the point as to the legality of the district's vote on the question of the approval of this lease, for the agency to cast the vote was selected by the act of 1870, nine years before the lease was made and the vote was actually cast, in 1879.

If the question of the right of this district to own stock and to vote stock was an original question, this court, I feel sure, would reach the same conclusion reached by the court below, that it has that right. But it is not an original question. This identical question was presented and was decided by the Court of Appeals of Kentucky (the highest court in the State) in the case of Krieger vs. Shelby Railroad Company *et al* (84 Kentucky Reports page 66), and the court expressly held that the Shelby Railroad District of Shelby county, under the amendment of Feb. 3d, 1869, without the aid of the act of March 11th, 1870, or of the act of February 26, 1873, was a stockholder in the Shelby Railroad Company to the extent of the principal of its bonds outstanding and unpaid, and to that extent had the right to vote at all stockholders' meetings and to receive dividends on its stock. That case (or cases, for there were three cases in one record) was brought to this

court by writ of error and was by this court dismissed for want of jurisdiction, the court holding that no Federal question was presented (125 U. S. 39). This court, in the opinion delivered by Justice Gray, said:

"It thus appears that the State court, upon full consideration, decided that the acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes could be exercised, and that it based its judgment entirely upon the construction and effect of the earlier statutes and upon ground which would have been equally controlling if the later acts had not been passed."

This decision of the Court of Appeals of Kentucky is final. The appellant here, the Shelby Railroad Company, was a party to that litigation and through it all its stockholders were parties, including appellant Hancock. True, the main question there was the right of the district to vote and to share in dividends. The main question here is the validity of the lease. But the validity of the lease at last depends on the right of the district to vote. With its vote cast for the approval of the lease, no question is made that it was approved by a majority of the stock. I desire to add that whether all the details of the general act of Jan. 22nd, 1858, which authorized the contracting parties to make this lease, were complied with, in the manner of the adoption or approval of the lease by the stockholders, can now be a matter of but little consequence. Wherever the power to do a thing is given, and the companies, in attempting to exercise it, have failed to comply with mere details in the execution of the power, and the contract has been excuted, and benefits have accrued under it, and money or property parted with under it, the courts will not disturb the contract for the neglect of such details. Zabriskie vs. Cleveland and Cincinnati R. R. Co. *et al*, 23 Howard 391; Bank of United States vs. Dandrige, 12 Wheaton

64; Parish vs. Wheeler, 22 New York 494; 16 California 264; 2nd Potter on Corporations 663.

The appellant, The Shelby Railroad Company, if it ever had the right to rescind this contract, has lost it. It is estopped to claim a rescission, first by the terms of the lease itself, and second, by conduct and the lapse of time since its execution. There is no allegation here of fraud, accident or mistake. Appellant seeks to avoid its own contract on the ground of its own excess of authority. It is not claimed that any objection was made by anybody to the manner of the ratification of the lease at the time of its ratification or subsequently. This lease was executed by both contracting parties under their respective seals, acknowledged in the most solemn manner known to the laws of Kentucky, before the clerks of the County Courts, as deeds conveying real estate are required to be acknowledged, and it contains a recital that it was done in pursuance of authority conferred by the Presidents and board of Directors and *stockholders* of both companies. (See records 325 page 10 and 326, page 8.) Can the Shelby Railroad Company now, after so solemn an act, by itself, acting under its seal, be heard to say that this recital in its deed is false; without alleging accident, fraud, or mistake, or waste, or injury, or that the public is being injured, in that the lessee is not properly and faithfully executing its agreement; using its own alleged disabilities as a sword and not as a shield, for no other reason than that its own stockholders have failed to approve the lease, although the agreement itself, under solemn seal, recites that it was executed by authority of the stockholders? If there can be an estoppel by recitals in a deed, have we not one now before the court?

In a foot note to O. R. R. Co., vs. O. Ry. and A. V. Co., 20, A. & E. R. R., cases 326, the author cites many cases in which

corporations had entered into contracts and received consideration therefor, though *ultra vires*, they were estopped to rely on that defense. Hazlehurt vs. Savannah, etc., R. R. Co., 43 Ga. 54; White vs. Franklin Bank, 22 Pick 181; Parrish vs. Wheeler, 22 N. Y., 494; Bissell vs. Michigan, etc., R. R. Co., 22 N. Y., 258; Southern Life Ins. Co. vs. Lanier, 5 Fla., 110; McCluer vs. Manchester, etc., R. R. Co., 13 Gray 124; Chapman vs. M. R. etc., R. R. Co., 6 Ohio St. 137; Hale vs. Mutual Fire Ins. Co., 32 N. H., 297; R. R. Co., vs. Howard, 7 Wall 413; Zabriskie vs C. & C. etc, R. R. Co., 23 Howard 381; Racine, etc., R. R. Co. vs. Farmers L. & T. Co., 49 Ill 346; Chicago Building Association vs. Crowell, 65 Ill. 454; St. Louis vs. Gas Light Co., 70 Mo. 69; Newsburg Petroleum Co. vs. Weare, 27 Ohio St. 343; Oil Creek, etc., R. R. Co. vs. Penn. Trans. Co., 73 Pa. St. 160; Peoria & S. R. R. Co., vs. Thompson, 7 A. &. E. R. R. cases, 101; Chaffee vs. Rutland etc., R. R. Co., 16 A. & E. R. R. cases 408; 16 A. & E. R. R. cases 448; 16 A. & E. R. R. cases 501; 1 A. & E. Corporation cases 231.

2nd. The company is estopped by conduct and laches. This lease stipulates for the payment of an annual rental of $15,000 by lessee to lessor, but in the event the C. & O. railroad is built, $13,000 per annum. It does not appear from the pleadings whether this road has been built or not. There is no complaint that the rent has not been paid and we may assume its payment. The lease shows that lessee is to keep the property in repair and lessor has no expense on account of it, except in paying the taxes. This would necessarily leave a surplus in the hands of the lessor for distribution in the form of dividends among the stockholders. The bill of complainant could, with entire truth and more fairness, have stated that out of this rent dividends have been declared from time to time and paid to the stockholders, this offending district receiving its share along with the balance and

without protest from any one. If this is true, that these stockholders have, during all these years since 1879, received in dividends the rents arising from this lease, are not the stockholders themselves, including Hancock, estopped to deny its validity?

The stipulations of the lease showed that the lessee, upon the faith of it and relying on its validity, assumed large obligations. The second item of the lease provides that the "second party shall perform the obligations of the first party as to all outstanding unexecuted contracts made by it for material and supplies, and it shall pay the sums agreed to be paid therefor by the first party." On this subject the bill is silent. Large sums of money may have been expended on this account and there is no offer to place the lessee *in statu quo*. The contract shows that the Shelby Railroad Company agreed to withdraw its opposition to the lessee's undertaking to build the line of the Northern Division of the Cumberland and Ohio Railroad and to use its influence toward the consummation of that undertaking, and it further shows that there was some sort of connection between the execution of this lease and the construction of that line. It is not alleged that that line has not been built. If the court takes judical knowledge of the geography of the country as to railroad location, and thus knows the relative position of Anchorage to Shelbyville, the terminal points of the road leased, and of Shelbyville to Bloomfield, the terminal points of the Northern Division of the Cumberland & Ohio Railroad, the building of which by the lessee is evidently dependent on the lease, it will see that the road of appellant, which was being leased, from Anchorage to Shelbyville, is absolutely indispensable to the operation of the road from Shelbyville to Bloomfield. Without this link the lessee can make no use at all of the twenty-seven miles of road from Shelbyville to Bloomfield, constructed by it on the faith of the validity of this lease and operated by it for twelve years in con-

nection with the leased line. The expense of the construction of this twenty-seven miles was necessarily very large. Yet, if appellants are granted the relief they seek, it would put it out of the power of appellee to operate that road at all.

The stockholders of this company met annually under the charter, so they had nine regular annual meetings after the execution of this lease before this litigation was begun. The lease shows that they met in convention and authorized this very lease. Any dissenting stockholder could, at that very time, if appellants contention be good, have enjoined the approval of the lease. But not so. Company, stockholders, officers, all wait nine years, meeting year after year, receiving rent, applying and using it as dividends after the debts are all paid, after the road is put in repair, after the other party to the lease had at enormous expense built the Cumberland & Ohio Railroad and was now operating it in connection with the leased line, alleging no fraud or mistake, no waste or injury to the property, after all this they come into court and say: We had no authority from the stockholders to make that lease, and when we said so, in the lease itself, under the solemn ceremony of a seal, we said what was false. Will this court hear such a complaint?

This court, in the case of Zabriskie vs. Cleveland, Columbus & Cincinnati Railroad, *et al* (23 Howard 400), in holding the railroad company bound by its conduct in acts and resolutions of its authorities said:

"A corporation, quite as much as an individual, is held to a careful adherence to the truth in their dealings with mankind and cannot, by their representations or their silence, involve others in onerous engagements and then defeat the calculations and claims their own contract had superinduced."

In a case decided in this court (Twin Lick Oil Co. vs. Murray, 91 U. S. 593) an effort was made to set aside a sale after

four years had elapsed from the time the purchaser took possession under the purchase. The court held, under the facts of that case, that four years was too long to wait. In that case the court said: "The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may reasonably be done after the party with whom that right is optional, is aware of the facts which give him that option, are numerous," and quotes the following cases: Badger vs. Badger, 2nd Wallace 87; Harwood vs. Railroad Co., 17 Wallace 78; Marsh vs. Whitman, 21 Wallace 178; Wentworth vs. Loyd, 32 Beav. 467; Follensbee vs. Kilrat, 17 Illinois 527.

To the same effect is Piatt vs. Vattier *et al*, 9 Peters 416, in which the court said:

"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced."

This paragraph is quoted with approval by this court from Lord Camden in Smith vs. Clay, 3 Brown's Chancery Reports 640. The suit was to recover a lot of land in the city of Cincinnati, Ohio. The court held "that the lapse of time is, upon the principles of a court of equity, a clear bar to the present suit," and that this was so independently of any statute of limitation. McKnight vs. Taylor, 1 Howard 160, quotes and reaffirms the rule in Piatt vs. Vattier.

To sum up: This lease should not be disturbed because:

1st. A majority of the stockholders ratified it, counting the the vote of the Shelby Railroad District of Shelby county, and

this district had the right to vote under the decision of the court of Appeals of Kentucky, which decision was, upon writ of error, virtually affirmed by this court.

2nd. Because of the recitals in the lease, under seal, that the stockholders authorized the lease.

3rd. Because of the laches and long delay of nine years in instituting this litigation after one party to the contract, relying on its validity, had expended large sums of money it would not have expended, and assumed large obligations it would not have assumed but for the existence of this lease.

These positions, it seems to me, are impregnable, when the well established rule is remembered that where a corporation has the substantive power to do a certain thing, but fails, in doing it, to use the technical formalities provided for, and the thing done is allowed to stand and is acquiesced in by both parties for a considerable period, neither can then secure relief.

I respectfully ask that Hancock's appeal be dismissed, but if this be not done that both judgments be affirmed.

J. C. BECKHAM,
Counsel for Appellees.

APPENDIX.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 6. That as soon as practicable, after fifteen hundred shares of stock shall have been subscribed, the said commissioners, or a majority of those acting, shall call a general meeting of the subscribers, at such time and place as they may appoint, and shall give at least twenty days' public notice thereof, and at such meeting the commissioners shall lay the subscription books before the subscribers then and there present, and thereupon, the said subscribers, or a majority of them then present, shall from among the stockholders elect six directors, by ballot, to manage the affairs of the company; and these six directors, or a majority of them, shall have the power of electing a president of said company, either from among the directors or any other stockholder, and of allowing him such compensation for his services as they may deem proper; and that in said election, and on all other occasions wherein a vote of the stockholders of said company is to be taken, each stockholder shall be allowed one vote for every share owned by him, her, or it; and every stockholder may, in writing, depute any other person to vote for him, her, or it, as his, her or its proxy; and the commissioners aforesaid, or any three or more of them, shall be judges of the said first election of directors. Approved March 15, 1851.

AN ACT to amend the charter of the Shelby Railroad Company.

§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the president and directors of the

Shelby Railroad Company, or a majority of them, are hereby authorized and empowered to form by contract a union of said company with any other railroad company, or to sell and transfer, and convey when sold, all the assets, real and personal estate, rights and privileges, of said company, and upon such terms and conditions as have been, or may hereafter be, sanctioned and approved by the stockholders owning a majority of the stock of said company; and said sale and conveyance when made shall divest the said Shelby Railroad Company of all chartered rights, and it shall cease to exist as a company; and the purchaser or purchasers shall be fully invested with all the chartered privileges now possessed by the Shelby Railroad Company under and by virtue of this and all previous acts of incorporation.

Approved March 10, 1854.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 6. That where any such subscription to the capital stock of said company shall have been ordered, and conditions aforesaid complied with, bonds shall be executed in the name of and under the seal of or scroll of said portion of Shelby county, or said counties, as the case may be, in such form and in such amounts; the entire amount of said bonds not to exceed the sum subscribed, and payable at such places, and bearing interest payable semi-annually, at such rates (not exceeding eight per centum per annum) as the president and directors may elect. The bonds shall be due and payable twenty years from their date, with the privilege reserved to the said counties to pay them after three years from date. The bonds shall be signed by the judge of the county court and countersigned by the county clerk. When so executed said bonds shall be delivered to the president and directors

of said company, in payment of said subscription, and they may be by them negotiated, hypothecated, or sold, upon such terms and at such times as may by said president and directors be deemed expedient, and may be transferred by endorsement.

§ 7. That when any such subscription shall have been made it shall be the duty of the county judge and the justices of the peace of the precincts or the counties in which the vote is taken to levy annually a direct tax upon all the property in such county, or portion of county, subject to taxation for State revenue, to pay the interest when due, and the principal at maturity; and they may levy a tax to pay any portion of said bonds at any time after three years: *Provided*, That no greater tax than one per cent. shall be levied in any one year except to pay the bonds at maturity. The taxes herein provided to be collected to pay the interest and principal of said bonds, shall be collected by the sheriff, or such other person as the county judge or justices of the peace may designate, who shall execute bond, conditioned that he shall faithfully discharge his duties and pay over the money collected by him. He shall collect the tax in pursuance with, and according to, the law for collecting the revenue, and shall receive such compensation as shall be voted him by the county judge and justices of said counties and said portion of Shelby, not exceeding three per centum, which amount shall be included in the levy. He shall pay over the taxes to a treasurer, to be appointed by the county judge and justices. The treasurer shall execute a similar bond to that of the collecting officer, and the compensation allowed him, not exceeding one per cent., shall also be included in the levy of taxes. The collecting officer shall execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when they amount to fifty dollars or more shall entitle the holder, upon presentation to the

proper officers of the company, to certificates of stock, at the rate of one share for fifty dollars, and every multiple of fifty.

§ 9. The several counties and portion of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders.

Approved February 3, 1869.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 12. No contract that the president and directors of said company may make with the Louisville, Cincinnati and Lexington Railroad Company, or any other railroad, shall be valid until the same shall be ratified by the stockholders of this company.

Approved February 3, 1869.

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§ 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*: That all railroad companies in this commonwealth shall have power and authority to make, with each other, contracts of the following character: 1. For the consolidation of either the management, profits, or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road, either temporarily or permanently. 2. For the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line. 3. For the completion, in whole or in part, of the unfinished road of any company. 4. For a giving a common name and style to any continuous road belonging to two or more companies: *Provided, however*, that all such contracts shall be approved by a majority, in interest, of all the stockholders of each of the contracting companies, at some stated or called meeting of the same.

SEC. II. That the called meetings of stockholders provided for in the first section, shall be called by the president and directors of the company, and notice of the time and place thereof, and of the purpose of such meeting, shall be advertised in one or more newspapers of general circulation in the county where the principal office of such company is then kept, for at least two weeks before such meeting. Approved, January 22, 1858.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 3. That when any county or part of a county, city, town or precinct, shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation, and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the county judge and all of the justices of the peace of the county. Stock owned by a part of a county or precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and these several bodies may designate a suitable person or persons as their proxies to represent them in any meeting of the stockholders of said company. It shall be the duty of the county judge to call together at the county seat the justices entitled to vote, and to cause their action to be spread upon the records of the county court.

Approved, March 11, 1870.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. That the part of Shelby county embraced in the boundary given in the second section of an act, entitled "An act to

amend the charter of the Shelbyville Railroad Company, and to authorize certain counties to take stock in the same," approved February 3d, 1869, have the corporate name of "The Shelby Railroad District of Shelby County;" and by that name may sue and be sued.

§ 2. That this act be in force from and after its passage.

Approved, February 26, 1873.